A DISSERTATION

SHEWING THAT THE

HOUSE OF LORDS

IN

CASES OF JUDICATURE

ARE BOUND BY PRECISELY THE SAME

RULES OF EVIDENCE,

AS ARE OBSERVED BY ALL OTHER COURTS;

WITH AN

APPENDIX

CONTAINING SOME FURTHER OBSERVATIONS ON THE EFFECT OF A DISSOLUTION OF PARLIAMENT UPON AN UNFINISHED IMPEACHMENT.

Legum idcirco omnes servi sumus, ut liberi esse possimus. CIC.

By EDWARD CHRISTIAN, Esq;

BARRISTER,

AND PROFESSOR OF THE LAWS OF ENGLAND

IN THE UNIVERSITY OF CAMBRIDGE.

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MDCCXCII.

TO

SIR JOHN SCOTT, KNIGHT,

HIS MAJESTY's SOLICITOR GENERAL,

THIS DISSERTATION

IS

WITH GREAT RESPECT

INSCRIBED

BY HIS MOST OBEDIENT,

AND MUCH OBLIGED,

HUMBLE SERVANT,

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A

DISSERTATION, &c.

IN a Pamphlet, which the Author publiſhed in the courſe of laſt winter containing the reſult of his enquiries concerning the effect of a diſſolution of parliament upon an unfiniſhed impeachment, the following obſervations were introduced.

" Since the commencement of the preſent Impeachment, a monſtrous doctrine has been urged, which, if eſtabliſhed, would arm the Houſe of Lords with a deſpotic power, and might eventually prove fatal to our liberty and conſtitution; which is, that they are not bound, like inferior courts, by the rigid and inflexible rules of evidence,

but may admit, at their diſcretion, any ſpecies of information which they may think neceſſary for the inveſtigation of truth.

" But I truſt that the Lords will always have wiſdom and virtue to reject ſuch pernicious propoſitions, and will remember that, in their character of judges, it is their province *jus dicere*, and not *jus dare*.*

" The rules of evidence, like the rules of morality, are preſumed to be founded in the beſt ſenſe poſſible, in reaſon and wiſdom matured and confirmed by the experience of ages; and, in all criminal proceedings, both in the higheſt and loweſt courts, whether at the Quarter-ſeſſions, or in the High Court of Parliament, and

" * This may be thought to be expreſſed with an unbecoming vehemence. It is a doctrine which I have frequently been obliged to reprobate among the circle of my friends; and I introduce it here, to enforce that univerſal principle, that the ſpirit and ſubſtance of Engliſh liberty conſiſt in the ſtrict adherence to rules and the letter of the law; and the more we introduce of arbitrary diſcretion, the more we ſhall approximate to the deteſtable maxims of the Eaſtern Governments."

and in the Court of the Lord High Steward, they are, and ought to be preciſely the ſame.

" And my Lord Coke ſolemnly cautions Parliaments ' * to leave all cauſes to be ' meaſured by the golden and ſtreight ' metwand of the Law, and not by the un- ' certain and crooked cord of diſcretion.'

" But though each of the two Houſes of Parliament may do many acts, from which there is no remedy or appeal, yet I truſt that they will always have ſuch a conſcientious regard to the extent of their privileges and juriſdiction, that they will never adopt the maxim, That they can do no wrong, — becauſe they can do wrong with impunity."

Sometime ſubſequent to the publication of that Pamphlet the author was ſurprized to hear that a gentleman of the firſt celebrity for talents in this Country had declared

" * Inſt. 41."

clared he could not ſuffer ſo erroneous and dangerous a doctrine to paſs unnoticed, eſpecially as it came from one, whoſe duty it was to inſtruct the riſing generation in the true principles of the Law and Conſtitution of England, and that in a ſpeech of conſiderable length he had endeavoured to prove and eſtabliſh that the Houſe of Lords are not bound by the Laws of Evidence like other Courts.*

I am not inſenſible of the honour to be thought of ſufficient conſequence that any error of mine ſhould deſerve the animadverſions and correction of one, who is regarded as a Pillar of State, and whoſe peculiar and anxious care it has long been to provide, *Ne quid reſpublica detrimenti capiat.*

But the zealous and faithful centinel, who would ſhed his beſt blood in the defence of the Citadel, may know little of its

* Vide the debates of the Houſe of Commons in the Morning Chronicle of the 15th of February, 1791.

its internal Structure, or how each part contributes to the ſecurity and happineſs of the whole.

The imputation of ignorance and temerity in denying the truth of a propoſition, which he has always heard with aſtoniſhment, and the apprehenſion of danger to the community, if it is falſe, when ſanctioned by a name of ſuch reſpectability, have induced the author to compile this diſſertation, and to obtrude his opinion once more upon the public.

It would not have been delayed ſo long, if a variety of engagements and avocations had not obliged him to ſuſpend his attention to the ſubject.

It is perhaps a melancholy conſideration to this Country, that men of the greateſt abilities generally imagine that they can comprehend the moſt important of all ſciences by intuition, and that they poſſeſs more refined and exalted ideas of law and juſtice

juſtice than thoſe, who are daily concerned in the adminiſtration of them; for it has been a common cuſtom of late to ridicule the authority of our profeſſion, and to pronounce that whatever we preſume to ſuggeſt is nothing but ſpecial pleading and Old Bailey practice.*

But thoſe who are firm in their principles,

* Far be it from me to treat ſuch important departments of the Law of England with diſreſpect. When forms are eſſential to the adminiſtration of Juſtice, the diſtinction between form and ſubſtance is idle and ſuperfluous. Forms are the ſcales, without which juſtice could not equally be diſtributed, if theſe were diſregarded, uncertainty and confuſion would be inevitable. But when forms ceaſe to anſwer the ends propoſed, they ought to be altered by Parliament, our judges cannot legiſlate.

With regard to the Old Bailey, tho' I have never had occaſion to attend there profeſſionally, yet I can declare that I have never heard that any thing was attempted by the gentlemen of the profeſſion who practiſe there, which the ſevereſt of the Judges would decline, if he were at the bar, and the caſe required it. And as a learned Recorder and his Majeſty's Judges preſide upon the bench, and the priſoners are tried by reſpectable juries from the city of London according to the Law of England, one may fairly conclude that juſtice is adminiſtered there with as much purity as in any Court under Heaven.

ciples, and ſteady to their purpoſe will never ſacrifice the Liberty of their Country to the popularity of the day, or cut the law of England, like a birth-day ſuit to the faſhion of the times.

We muſt bear patiently to be taunted with our inferiority in every debate, in which from our profeſſion it is expected we ſhould excel—We have not the choice which Dr. Johnſon in his younger years was eager to adopt, "When I was a boy, "ſays he, I uſed always to chuſe the wrong "ſide of a debate, becauſe moſt ingenious "things, that is to ſay, moſt new things "could be ſaid upon it."

An Orator, who is not confined by the rules and authorities of law, can find a thouſand entertaining arguments to ſupport what he has advanced, and by appealing to the paſſions and good ſenſe of his audience, he is ſure to conciliate the favour and applauſe of the vulgar and undiſcerning.

But

But the lawyer muſt rely entirely upon his caſe and his authority, which though it ſometimes may be abſurd and *perquam durum*, yet will admit of one argument ſufficiently convincing with men of ſenſe, that it is the *lex ſcripta* or the law of the land. Of late we have forgot thoſe venerable records, which my Lord Coke ſays it chears one to think of, and which are the noble declarations of the rights of Engliſhmen.

But let us ever remember that in the firſt of our written laws, we find

Nullus Liber Homo capiatur vel impriſonetur aut diſſeiſiatur de libero tenemento ſuo, vel libertatibus, vel liberis conſuetudinibus ſuis, aut utlagetur, aut exulet aut aliquo modo deſtruatur, nec ſuper eum ibimus, nec ſuper eum mittemus niſi per LEGALE JUDICIUM PARIUM SUORUM VEL PER LEGEM TERRÆ.

Who that has the ſpirit of an Engliſhman can read this without involuntarily preſſing

preſſing his hand upon his heart, and imprecating the vengeance of heaven upon the violators of it.—Notwithſtanding the coarſeneſs of the language, how poor and feeble is the *verbiage* of the modern declarations of rights, compared with this firſt Great Charter of the liberties of Engliſhmen.—But it has been diſcovered that our anceſtors have been guilty of a groſs error, and what they thought they had tranſmitted to us as a treaſure, is in fact an incumbrance and a nuiſance. For how can the *Lex Terræ* be conſiſtent with reaſon, juſtice, or liberty, which would put an end to a trial, that had continued three years, or which would confine the proſecution of that trial to the narrow rules of evidence obſerved in the inferior courts.—Thoſe, who are unwilling to admit that the Houſe of Lords upon the preſent occaſion ſhould be tied down to laws and rules, ſeem to have an illuſtrious inſtance for their argument,

"I beſeech you
Wreſt once the laws to your authority,
To do a great right, do a little wrong."

But Shakeſpeare, that great maſter of nature, (and the beſt governments are moſt conformable to nature,* or to the particular circumſtances under which men are placed by nature) will always be found to make his beſt and wiſeſt characters expreſs the trueſt and juſteſt ſentiments of law, liberty, and government — He firmly and boldly anſwers, and in the character too of a lawyer —

> It muſt not be, there is no power in Venice
> Can alter a decree eſtabliſhed —
> 'Twill be recorded for a precedent,
> And many an error by the ſame example
> Will ruſh into the ſtate — it cannot be,

One of the great ſources of liberty is the certainty of the law, in which the ſubject can

* It is not my intention to make any inſinuation in favour of that contemptible expreſſion *The Rights of Man*, which in my humble opinion is diſgraceful to the theory and philoſophy of an enlightened people — It leaves a convenient ambiguity to ſedition, to interpret it either the rights of a ſavage or a civilized man, and in one ſenſe at the leaſt it is equally ſubverſive of the beſt governments as the worſt — When men flock together, government is as neceſſary and as natural to the ſtate of man, as raiment and habitations.

can repoſe with confidence and ſecurity, as he foreſees the certain conſequences of all his actions.

It is the peculiar characteriſtic of the Engliſh government to abhor diſcretion, which is equally ſlavery, whether it is pronounced by one, or the majority of 700. A power to diſpenſe with law is alike dangerous and deteſtable, whether it is veſted in the King, or any other part of the government leſs than the ſupreme power of the ſtate collected in the King, Lords, and Commons.

No ſentiment has yet been uttered in or before the National Aſſembly of France more worthy of a great and a free people than this, viz. *Let the track of the Law be purſued though it ſhould lead over burning ploughſhares**.

This

* A declaration made before the National Aſſembly by the Citizen Soldiers of Sainte Opportune, Oct. 7, 1791.

This noble maxim I ſhould wiſh to have written in conſpicuous characters in every court and place in the kingdom, where legal judgments and reſolutions are to be pronounced.

We are frequently entertained by eloquent declamations upon liberty and ſubſtantial juſtice, but the enthuſiaſm of the orator is apt to hurry him beyond the bounds of utility, and the practicability of human affairs. He can paint the diſtant landſcape in all the colouring and beauty of art and nature, but he cannot find his way to thoſe pleaſing objects before his eyes, of which he gives us ſo agreeable a repreſentation.

I ſhould have imagined previous to any inveſtigation of the queſtion, that, in a country governed by equal laws, no propoſition could be more ſimple and evident than this, viz. that the guilt and innocence of every ſubject muſt be manifeſted by the ſame *media* of proof, or by the ſame rules of

of evidence — And that one might have been warranted in closing the controversy by declaring that *contra negantem principia non est disputandum.* When a proposition is so clear, that no clearer proposition can be brought in support of it, it is self-evident and incapable of demonstration; for all human reasoning is a gradual progression from undeniable truths or by certain steps to what without such aid would be uncertain and obscure.

And nothing can be more irksome to an author than to be obliged to undertake the proof of a doctrine, of which he hardly conceives a doubt can be entertained, as he must necessarily apprehend, that he will incur the imputation of puerility and frivolity, or insult the understanding of his reader.

Before I proceed to the consideration of the law of evidence, which is perhaps the most beautiful and philosophical branch of English jurisprudence, I think it not foreign

foreign to my purpoſe, to give a ſhort explanation of the policy of laws, and the general rules, which are eſſential to the adminiſtration of public juſtice.

It has been aſked *Vir bonus eſt quis?* and it was anſwered by one unacquainted with the diſtinction between the private practice of morality, and the public adminiſtration of juſtice:

Qui conſulta patrum, qui leges juraque ſervat,

and therefore it might juſtly be replied,

Sed videt hunc omnis domus, vicinia tota
Introrſum turpem, ſpecioſum pelle decorâ.*

Religion and morality enjoin us to cheriſh a ſpirit of goodwill and benevolence, and to diſcharge the reciprocal obligations of ſociety—If their voice were heard, and their precepts in every inſtance obſerved, government would be a ſuperfluous pageant, and the law a dead letter. —But ſuch is the imperfection of human nature and human eſtabliſhments, that *it is im-*

* Hor. Epiſt. Lib. I. Epiſt. 16.

impoſſible but that offences will come, yet it is the wiſdom and object of every government, but particularly of that conſtitution, under which we have the happineſs to live, to endeavour to diminiſh their number in as great a degree as the nature of things will admit. — Where perfection is denied, prudence conſiſts in aiming at the beſt that is practicable; and true excellence in attaining it. — The prevention of injuſtice, or the maxim, *of two evils chuſe the leaſt*, is the principle, which pervades almoſt the whole ſyſtem of Engliſh juriſprudence.

A man is as much bound by every religious and moral conſideration to diſcharge a debt or compenſate an injury after ſix years, as he was the moment after he had contracted the one, or been guilty of the other; but the law permits him to do an act of great injuſtice by pleading a limitation of time in bar to the demand. — Thoſe, who made this law had found by experience, that, for want of ſuch a defence, much diſhoneſty was practiſed in claiming

and

and recovering debts, which either had been diſcharged, or had never exiſted; and though ſuch a plea by a perſon, who is conſcious he has never ſatisfied a fair and righteous demand, is as great an act of villainy, yet the legiſlature of this Country wiſely thought, that by the introduction of ſuch a ſtatute*, the ſum of injuſtice would be conſiderably diminiſhed. It was not intended as a weapon of offence, but a ſhield to protect. Paper, parchment, and ſealing wax can give no efficacy to the moral obligation of a promiſe or contract, but when verbal engagements were carried into execution by our courts of juſtice, it was diſcovered that much villainy and perjury were committed by ſwearing to contracts, which never had exiſted; and though he who denies a real contract is not a much better man than he, who ſwears to a falſe one, yet the legiſlature thought that leſs injuſtice upon the whole would be done, if many of the moſt important contracts in ſociety were not enforced by courts of juſtice,

* 21 Jac. 1. c. 16.

juſtice, unleſs a written inſtrument was produced as the moſt certain evidence of their exiſtence *. The ſame principle prevails in a great part of the common law, the moraliſts tell us that *fides ſervanda eſt*, or that every man is bound to keep a promiſe which has been accepted or has raiſed expectation; but it is a maxim both of the Roman Law, and the Common Law of England, *ex nudo pacto non oritur actio*, or that no ſimple contract can be enforced in a court of juſtice, which is made without an equivalent, which is technically called *conſideration*: The law having wiſely deemed that leſs injury would be done to ſociety, if courts of juſtice took no cognizance of raſh and precipitate promiſes; and it afforded a ſtrong preſumption that all promiſes were made without due conſideration, when no reciprocal benefit accrued to him who had made the promiſe †. If

* 29 Car. 2. c. 3. An act for prevention of frauds and perjuries.

† But where an engagement is entered into with the ſolemnities of a ſealed inſtrument, it precludes the preſumption of a want of due conſideration, and no equivalent is neceſſary.

If a gentleman were paying his addreſſes to a lady, where there was no diſparity in their circumſtances, or impropriety in their union, it could ſcarce be conſidered a violation of morality, if he ſhould give a bond, note, or promiſe to any perſon, who could promote his ſucceſs; but a ſlight knowledge of human nature, or an experience of the world, would ſoon inſtruct us, that any perſon, even a ſervant, who has acceſs to a young lady, might make ſuch an impreſſion upon her mind by beſtowing unmerited praiſe upon one of her admirers, and depreciating the good qualities of another, as that ſhe might eaſily be induced by ſuch influence to give a preference to the leaſt deſerving, or be inveigled into a miſerable marriage with a neceſſitous adventurer. And therefore all ſuch engagements our law has wiſely declared to be abſolutely null and void. Lord Thurlow in his argument upon reſignation bonds in the Houſe of Lords declared to this effect, "that Marriage Brocage bonds, "were not ſet aſide becauſe they muſt be

" attended with fraud, for that certainly " was not the caſe in Scott v. Potter in " Shower's Parliamentary caſes, which " was a marriage between parties in every " reſpect ſuitable to one another, and the " bond was not ſet aſide on account of any " particular miſchief in that caſe, but pro- " feſſedly becauſe ſuch a practice was full " of great inconvenience, and the policy " of law ought to prevent it, becauſe the " practice was *pravi exempli* *."

The caſe is the ſame with regard to bargains to purchaſe any public office, for though many of thoſe contracts might be agreeable to ſtrict abſtract juſtice, yet the univerſal permiſſion of them would be more injurious to ſociety than the univerſal rejection. Lord Loughborough ſpeaking of one of them obſerves, " That this " agreement reſting on private contract " and honour, may perhaps be fit to be ex- " ecuted by the parties, but can be only " enforced by conſiderations, which apply " to their feelings, and is not the ſubject

 " of

* From a MSS. note.

" of an action. The law encourages no " man to be unfaithful to his promiſes, " but legal obligations are from their na- " ture more circumſcribed than moral " duties *." It were endleſs to purſue this principle through all the branches of our juriſprudence in which it prevails. This will ſuffice to exhibit its nature and extent. It is in truth, though it leads to different concluſions, the ſame principle of convenience and expediency, which is the only foundation of all the rules of private juſtice and abſtract morality.

Atque ipſa utilitas juſti prope mater et æqui.

But thoſe rules, which we learn by experience to be eſſential to the regulation of ſociety, to diſtinguiſh them from the precepts of the moraliſts, we denominate ſound policy, which is nothing more than another name for good government. And here I cannot forbear to mention that it is the principle upon which Mahomet has prohibited all gaming and the uſe of wine. " They will aſk thee concerning wine and games of hazard,

* Henry Blackſtone's Reports, 327.

hazard, ſay unto them, they are a great ſin, but yet they are of utility to men, but the evil they cauſe is greater than the benefit they yield*." Though we do not find in the Koran that ſpirit of benevolence †, which characteriſes the ſcriptures, yet in the legiſlation of the pretended prophet, we frequently perceive the mind of a Hale or a Hardwicke.

If we examine the laws of evidence, we ſhall ſoon diſcover that they are eſtabliſhed upon this grand and fundamental principle of ſound policy, or that they are intended to be ſuch as, to uſe an expreſſion of the mathematicians, that the ſum of juſtice may be a *maximum*, or rather the ſum of injuſtice a *minimum*. They are fixed at that delicate point, which is beſt calculated for the conviction of guilt, and the protection of innocence.

Two

* Koran, chap. 2.

† It is a ſtriking ſentiment of an elegant hiſtorian, Mr. Gibbon. "That benevolence is the foundation of juſtice, ſince we are forbid to injure thoſe, whom we are bound to aſſiſt." 5 Vol. 215.

Two learned and celebrated foreigners, Monteſquieu and Beccaria, have cenſured our laws, becauſe in an accuſation of every crime, except treaſon and perjury, the priſoner may be found guilty upon the teſtimony of one witneſs. The witneſs who affirms, and the priſoner who denies, ſay they, leave the proof *in equilibrio*, and it is neceſſary to have another witneſs to make the ſcale preponderate *.

I cannot forbear to pronounce that this is an idle trifling conceit, and unworthy of thoſe,

* Les loix qui font périr un homme ſur la dépoſition d'un ſeul témoin, ſont fatales à la liberté. La raiſon en exige deux, parcequ'un témoin, qui affirme, et un accusé, qui nie, font un partage, et il faut un tiers pour le vuider. Mont. l'Eſprit des Loix. liv. 12. ch. 3.

Piu d'un teſtimonio e neceſſario, perche fin tanto che un aſſeriſce, ed áltro nega, niente v'è di certo, e prevale il diritto che ciaſcuno ha d'eſſere creduto inncocente. Bec.

Theſe trifles pleaſe by their epigrammatic quaintneſs and the neatneſs of the language, in which they are expreſſed. If they deſerved an anſwer, one might obſerve, the balance is fallacious, for between him, who has all to gain and nothing to loſe, and him, who has nothing to gain but all to loſe, both here and hereafter, the odds are wonderful indeed!

thoſe, who are ambitious of the title of philoſophers. The law of England is eſtabliſhed upon more ſolid grounds. Melancholy and deplorable is the inſtance, when an innocent man falls a ſacrifice to the laws; but long experience has ſhewn the wiſdom of the rule, and has proved that it is founded upon the ſureſt baſis, the *Salus Populi*, or the ſafety of ſociety.

The maxim, that it is better that a certain degree of guilt ſhould eſcape, than that a proportion of innocence ſhould ſuffer, has its limit.

Even the cautious Lord Chief Juſtice Hale fixes it only at five to one, "for it is "better, ſays he, five guilty perſons ſhould eſcape unpuniſhed, than one innocent perſon ſhould die*."

But in the barbarous times of our hiſtory thoſe, whoſe oppoſition had excited the diſpleaſure, or whoſe poſſeſſions tempted the

* P. C. 2 vol. ch. 38.

the rapacity, of the crown, were generally murdered by the ſword of juſtice; as it was not difficult to find one perjured villain, who would ſwear to the guilt of an innocent man. To remedy, in ſome degree, this enormous grievance, a law was enacted in the benign reign of Edward the ſixth*, which provided that no perſon ſhould be convicted of treaſon, but upon the evidence of two lawful witneſſes. The legiſlature at that time thinking that leſs injuſtice would be the conſequence, if every traitor ſhould eſcape, who might have been convicted by one fair witneſs, than if every innocent ſubject ſhould be expoſed to the perjury of one aſſaſſin.

Having thus premiſed, that the protection of innocence is not leſs the object of the laws of evidence, than the puniſhment of guilt, I ſhall now proceed to the conſideration of that which is the immediate ſcope of this diſſertation, viz. to prove that theſe laws are invariably the ſame in all judicatures. And in the diſ-

* 5 and 6 Ed. c. 11.

diſcuſſion of this queſtion, I ſhall endeavour to produce ſuch obſervations, arguments and authorities, as will be as applicable to all future impeachments, as the preſent, except ſo far as I ſhall be obliged to take notice of arguments on the other ſide, drawn from the peculiar circumſtances of the preſent caſe. Indeed, I have rarely had an opportunity of attending the trial, and I have not peruſed any printed account of it; therefore if any propoſition, which I may have occaſion to advance, ſhould ſeem to bear a particular reference to what has paſſed in the preſent impeachment, it is imputable to accident and not to deſign *.

All

* No expreſſion whatever is meant to be applied to the facts, or to extenuate or aggravate the circumſtances of the preſent accuſation. If I were intentionally to uſe any ſuch expreſſion, I ſhould think myſelf guilty of a libel, upon the public juſtice of the Nation, but if any abſtract propoſition of law is advanced by the defendant, his counſel, the honourable managers of the Houſe of Commons, the noble Lord who preſides at the trial, or by the Houſe of Lords unanimouſly, I conceive that I and every ſubject in this Country, have a right to examine it and animadvert upon it with decency, and the only penalty we could incur, might be the imputation of preſumption and abſurdity.

All the reaſons and authorities, which I am about to produce, equally affect the defendant and the proſecutors. The partiality ſhewn to the former by the Civil Law is unknown to the law of England.

In the Civil Law there were various diſtinctions in favour of the defendant. Matthæus, a learned profeſſor of the Civil Law in the Univerſity of Utrecht, tells us, *Inter crimen et innocentiam tres apud interpretes differentias reperio; Prima, quod accuſator criminis probandi cauſâ teſtes non poſſit producere ad perpetuam rei memoriam, reus poſſit probandæ innocentiæ gratiâ. Secunda, quod crimen uno teſte probari non poſſit, innocentia poſſit*. Tertia, quod crimen non probetur niſi per teſtes exceptione majores, innocentia etiam per teſtes minus idoneos, imò per quamlibet ſemiplenam probationem. Poſtremò inter accuſatorem et reum hoc quoque agnoſcunt diſcrimen quod accuſatori cauſâ cognitâ abolitio concedatur, et venia omittendi accuſationem. Reo autem defenſionibus ſuis renunciare non liceat, nec volenti*

* This is true in our law in caſes of treaſon and perjury.

volenti perire concedatur. Matthæus de Criminibus, Tit. XV. c. 7.

And Farinacius in his *Tractatus de Teſtibus* ſtates, that *Regula eſt quod teſtibus ad favorem rei deponentibus magis credatur quam deponentibus ad favorem actoris, etiam quod dicti teſtes rei ſint minus idonei.* Quæſt. LXV. 5 Reg.

But theſe diſtinctions have never been introduced into the law of England; for, far from ſhewing any favour to the defendant in the examination of witneſſes, we can ſcarce hear without horror, that the ancient law of this Country did not permit him, when his life was in danger, to produce any witneſſes whatever. And it was one good trait in the character of the ſanguinary Queen Mary, that ſhe firſt granted the indulgence to priſoners to call witneſſes in their favour; but though by her own authority ſhe directed the judges to receive their teſtimony, ſhe could not empower them to adminiſter an oath to

the priſoner's witneſſes; and as they were not ſworn nor ſubject to the penalties of perjury, little credit would be given to their aſſertions; and it was not till the 1ſt. year of Queen Anne that it was enacted, that in caſes of treaſon and felony, the witneſſes for the priſoner, ſhould be ſworn and examined in the ſame manner as the witneſſes for the crown *. But ſtill, if an innocent man cannot prove his innocence by the ſtrict rules of evidence, it is a miſfortune, which he muſt bear with reſignation, and he can only hope for relief from the clemency of his Sovereign.

The law of England, like the law of nature, acts by general, not by partial rules. It will not work a miracle, either for the protection of innocence, or extermination of guilt:

> When the looſe mountain trembles from on high,
> Shall gravitation ceaſe, if you go by;
> Or ſome old temple, nodding to it's fall,
> For Chartres' head reſerve the hanging wall.

And

* 1 Ann. ſtat. 2. c. 9.

And if there is a general law in this Country, which can be ſupported by clear authority, that the Houſe of Lords are not bound in caſes of judicature by thoſe rules of evidence, which are adhered to in the other courts, there is an end of the queſtion: And reaſons and abſtract arguments to the contrary would be unavailing and ſuperfluous. But I declare, that in the extent of my reading, I have never met with the leaſt ſuggeſtion to that effect.

In the argument, which I alluded to at the beginning of this diſſertation, I underſtand the following authority was cited from the rolls of parliament:

En yceſt parlement, toutz les ſeigneurs ſi bien eſpiritels come temporels alors preſentz clamerent come lour Libertee et Franchiſe, que les groſſes matires moevez en ceſt parlement, et a movers en autres parlementz en temps a venir, tochantz pieres de la terre, ſerroient demeſnez, ajuggez, et diſcus par le cauns de parlement, et nemye par la Loy Civile, ne par la commune

ley

ley de la terre, uſez en autres plus bas courtes du royalme: quell claym, liberte, et franchiſe le Roy lour benignement alloua et ottroia en plein parlement. 11 Ric. 2. n. 7.

It is difficult to ſay, what was the intent of this reſolution of the Houſe of Lords, confirmed by the aſſent of the King; but from the complexion of the times, it is probable, it was to veil ſome proceeding, which, they were afraid, would not bear examination. To be convinced, that theſe were times of great violence, we need not travel beyond the records of parliament; for in the twenty-firſt year of the ſame reign of Richard the ſecond, all the proceedings of the parliament held in the eleventh year, were declared null and void; but the tranſactions of the twenty-firſt, were in the firſt of Henry IV. reſcinded and annulled, and thoſe of the eleventh, were again revived and re-eſtabliſhed.

Allowing it then, as we muſt, to be a parliamentary authority, let us conſider its

its effect and import. It must be granted, that it signifies, that the course or practice of parliament, may be different from the common law as administered in the inferior courts. But still it can only amount to a confirmation of a different practice, where from other evidence and authority it appears that a different practice prevails. We must therefore enquire, in what instances the course of parliament, and the course of other courts vary. And it is certainly established by the cases of Lord Wintoun and Dr. Sacheverel, that the charge or crime need not be stated in an impeachment, with the same degree of technical accuracy, or attention to the rules of special pleading, which are required by the law in all indictments.

In Dr. Sacheverel's case, it was determined that by the law and usage of parliament, in prosecutions by impeachment for high crimes and misdemeanours, by writing or speaking, the particular words supposed to be criminal, are not necessary

to be expreſsly ſpecified in ſuch impeachment. Though all the judges were of opinion, they muſt be expreſsly ſtated in an indictment, and an information *.

In Lord Wintoun's impeachment, the Lords decided, it was not neceſſary that the treaſonable acts ſhould be ſtated to be done on a certain day, which cannot be diſpenſed with in an indictment; but they held, that ſtating them to be done *in or about the months of September, October and November*, was ſufficient in an impeachment †.

Theſe authorities have been mentioned, in order to infer, that the laws of evidence are not obligatory upon the Houſe of Lords; but with all deference, in my opinion, they have a tendency to prove directly the reverſe.

The principal object of the forms of ſpecial pleading, or of ſtating the charge with

* Har. St. Tr. 5 vol. 828. † Ib. 6 vol. 50.

with technical accuracy, was, and is ſtill, to inform the court and the parties, what was intended to be proved, that neither ſide might *travel out of the record*, and ſurprize the other with evidence, which he did not come prepared to reſiſt.

If then this is founded in reaſon, and there could be any variation in the laws of evidence, the principles of juſtice, and the ſpirit of our law would require, that in proportion to the laxity of pleading in the ſtatement of the crime, there ought to be a greater ſtrictneſs and ſcrupuloſity in the admiſſion of the evidence to ſupport it. It is remarkable, that in Lord Wintoun's caſe, Lord Cowper, who was high ſteward upon the occaſion, addreſſed Lord Wintoun thus, "Your lordſhip is the firſt, "that on an impeachment for high trea-"ſon, will have had the benefit of a good "law, made in the firſt year of the late "Queen, (ſince the revolution) whereby "in all trials for high treaſon, as well as "other capital offences mentioned in the

" act, the witneſſes produced on the part " of the priſoner are to be examined on " their oaths. So that your witneſſes will " become entitled, in reſpect of the obli- " gation under which they give their teſti- " mony, to the ſame degree of credit as " the witneſſes produced againſt you will " be." This addreſs of my Lord Cowper clearly proves, that the Houſe of Lords, previous to this time, in caſes of judicature, followed the practice of the other courts, in not permitting the priſoner's witneſſes to be ſworn.

The difference between the forms of parliament, and the general law of the land, has been well deſcribed by Lord Chief Juſtice Vaughan; for it is ſaid, when he was a member of the Houſe of Commons, he told them " That they were not bound " by the forms of law, but they were tied " to the rules of law *." The laws of evidence are not the rules of any particular court; for when new juriſdictions are eſtabliſhed,

* Har. St. Tr. 5 vol. 66.

bliſhed, of which deſcription were once the courts of *niſi prius*, and courts of quarter ſeſſions, no direction, with regard to evidence, need be given in the ſtatute creating the new juriſdiction, unleſs a difference is intended; for the whole law of evidence will immediately attach upon that new judicature. The rules of evidence are eſſential to the manifeſtation of the crime, and as the crime is defined and limited by the law, ſo is the evidence, or the demonſtration of the crime, and there is as ſtrong reaſon that evidence ſhould be the ſame in all courts, as that the definition of the crime ſhould be the ſame in all courts. Evidence differs from form juſt as the demonſtrations in Newton and Euclid differ from the language, print, and materials, in which they are communicated. Thoſe demonſtrations are a ſeries of propoſitions eternally and univerſally true, whether they are written in Greek, Latin, French, or Engliſh, whether upon paper or parchment, in folio or duodecimo; ſo the laws of evidenee, which are preſumed to be the beſt and eſſential demonſtrations of guilt

or innocence, ought to be eternally and univerſally the ſame, whatever may be the forms, by which the adminiſtration of juſtice is regulated. It is true, that in different nations the laws upon evidence will vary as much (or perhaps more) as the laws reſpecting crimes, or contracts, or any other ſubject of legiſlation; but ſtill each country muſt ſuppoſe that its own ſyſtem is the moſt conformable to the ſtandard of reaſon, or to the reſult of their experience.

In the Civil Law the *Regulæ*, *Ampliationes*, *Limitationes*, and *Sublimitationes*, and the various commentaries upon them, are ſwelled to dimenſions, which would far exceed thoſe of all the Engliſh Statutes at large put together. Among theſe may be reckoned the voluminous and ponderous treatiſes of *Farinacius de Teſtibus*, *Muſcardus de Probationibus*, and *Menochius de Præſumptionibus**. They have a great variety of rules,

* The Commentary of Matthæus in the Chapters de Probationbus, is the only book upon evidence, in the Civil Law, that I have had occaſion to look into, which can be read with pleaſure.

rules, which we have no knowledge of; for example: *Regulæ ſunt, quod inimicus contra inimicum non admittatur, nec amaſius pro amaſiâ; quod magis credatur teſtibus ſenioribus quam junioribus, clericis quam laicis, maſculis quam fœminis, virgini quam viduæ, affirmantibus quam negantibus, etiam quod affirmantes ſint laici, et negantes ſint clerici*, and ten thouſand ſimilar rules and diſtinctions, which the law of England has thought it better to be without.

Beſides that different nations will vary in the laws of evidence, the ſame country at different times will alter their laws upon that ſubject. If the beſt could be aſcertained, they ought ever to remain invariable; and it is much to the credit of the Engliſh ſyſtem of evidence, that it is confirmed by the experience of ages: it is almoſt entirely derived from times anterior to the moſt ancient of our ſtatutes; for except two or three alterations which have been made by parliament, it is wholly founded upon the unwritten, or common law.

I am

I am not ſo much in love with my ſubject, as to be blind to its defects, and not to be ready to acknowledge, that our law of evidence is capable of great improvement. It is only neceſſary to mention a ſingle inſtance.

If a ſentence of excommunication is pronounced againſt any man for contumacy, or ſome trifling ſpiritual offence, the public juſtice of the nation is deprived of the benefit of his teſtimony, till that ſentence is reverſed. And the property, liberty, and life of an innocent man may be loſt for want of the evidence of one, whoſe veracity, by ſuch a ſentence, in the opinion of mankind, is not in the ſmalleſt degree contaminated; and whoſe word will paſs for as much upon 'Change the day after the ſentence is pronounced, as on the day before, yet pending the exiſtence of the ſentence in no court of juſtice can he be heard upon his oath.

Whatever policy there might be in this rule

rule in ancient times, it has long ſince ceaſed, and it is now an obſtruction to public juſtice in the temporal courts, without being any furtherance of it in the ſpiritual. But it is not the fault of judges or lawyers, that ſuch a nonſenſical ridiculous law ſhould exiſt; it is as irrevocable as fate, till it is abrogated by the united authority of the King, Lords, and Commons.

Having endeavoured to diſtinguiſh between the forms of parliament, and of other courts, and the general law, to which all of them muſt be ſubject, and to prove that the authorities, which have been referred to, apply only to the ſpecial pleading, or the formal part of the adminiſtration of juſtice; I ſhall now proceed to produce ſuch poſitive authorities as I have been able to collect, and ſuch arguments as my own mind has ſuggeſted, to ſupport the propoſition, which I maintain, viz. that the Houſe of Lords are bound by the ſame law

law of evidence, which is received, or ought to be received, in all other courts. I ſay ought to be received in all other courts, for it muſt be admitted that there are ſeveral deciſions upon evidence, as upon every other ſubject, which are of equivocal authority, and may, perhaps with propriety, be queſtioned both in the Houſe of Lords, and in every other court in the kingdom. If the four judges of the reſpective courts of Weſtminſter Hall were infallible, and never pronounced an erroneous deciſion, appeals, rehearings, and writs of error would ceaſe to fill a conſiderable portion of our books. Points of evidence, upon which there is a diverſity of opinion, can only be fixed and aſcertained by the *dernier reſort*, the Houſe of Lords. But what I advance is this, viz. that whatever the Lords, upon an appeal, would determine to be the evidence of the inferior courts, they are bound to declare that to be the law of evidence in their own court, in all judicial caſes. Perhaps every lord of parliament is in

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the commiſſion of the peace*; whatever then any peer upon full conſideration, and the beſt information, would pronounce to be evidence, when he is acting by his own fire ſide as a juſtice of the peace, or preſiding at the quarter ſeſſions, that, upon the moſt important, and moſt ſolemn occaſion in full parliament, he is bound to declare to be evidence. We often hear it aſked with a contemptuous tone of triumph, Shall the Houſe of Lords, a tribunal erected by the conſtitution, to try and condemn the governors of provinces, the miniſters of the crown, and Princes of the royal blood, be bound by thoſe paltry rules of evidence, by which at the Old Bailey, they convict a pickpocket, or try at Hicks's Hall a petty aſſault and battery? But let us not be impoſed upon by high ſounding words, and an affectation of unmeaning myſtery and ſublimity. It matters not which court precedes, but they muſt follow

* All privy counſellors are in every commiſſion of the peace, and peers who are not of the privy council, are generally in the commiſſion for thoſe counties, where they have eſtates and connections.

low each other, till they eſtabliſh a permanent and invariable conformity. Nor is there any circumſtance, which can give us more ſatisfaction and delight, in contemplating the law of England, than to be convinced, that it pays no regard to rank or ſtation, and that the life and liberty of a Prince and a porter are equally under its protection, and when public juſtice demands it, are equally expoſed to hazard and danger.

It will ſcarce, I preſume, be aſſerted, that there is a difference in the law of evidence before the Houſe of Lords in parliament, whether the proceeding is by indictment, or by impeachment; for in both caſes all the Lords are the judges, both of law and fact; and every peer for treaſon and felony, may be either impeached or indicted. Nor do I imagine that it will be contended, that there is a difference in the court of the Lord High Steward, in which the proſecution muſt commence by an indictment, and where the Steward is the ſole judge of points of law and evidence, and the peers are triers

of

of fact only. Whether a peer is tried upon an indictment in the court of the High Steward, or in the high court of parliament, depends entirely upon the contigency of the ſitting of parliament; and it cannot reaſonably be ſuppoſed, that whether a peer is impeached or indicted in full parliament for the ſame crime, his chance of conviction or acquittal ſhould be altered; and therefore I conclude in all theſe caſes, that the evidence muſt be the ſame. Having never heard or ſeen any diſtinction ſuggeſted, I ſhall take that for granted, and ſhall mention thoſe judicial caſes in the two courts, in which I find points of evidence, argued and decided upon the ſame principles, which would have been the ground of deciſion in every inferior court.

In all caſes of judicature before the Houſe of Lords, it has been the antient practice for the twelve judges to be conſtantly preſent; and queſtions which aroſe upon evidence, have always been referred to them for their opinions; from what

ſources they ſhould draw their information, but from the *lucubrationes viginti annorum* in the Common Law, and their experience in the inferior courts, I can form no conjecture.

I ſee one of our learned judges has in fact declared, that what is decided upon evidence in the Houſe of Lords, in an impeachment, is an authority for the inferior courts, and conſequently ſo far, if there is a conſiſtency in the Houſe of Lords, the evidence in both muſt be uniformly the ſame. I mean Mr. J. Buller, who in the laſt edition of the Law of *Niſi Prius*, in the chapter upon evidence, refers to Mr. Haſting's caſe before the Houſe of Lords, as an authority upon one point *.

In the caſe of the Earl of Somerſet, who was tried for murder, before the court of the High Steward, Lord Bacon calls evidence, the lanthorn of juſtice †.

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* P. 297. † Harg. St. Tr. 1 vol. 351.

The firſt caſe that I ſhall mention, is that of the Earl of Briſtol *. On the 6th of February, 1626, the Earl was accuſed of high treaſon, before the Houſe of Lords in parliament, by the King's Attorney General. On the 8th of May following, the Earl petitioned the Houſe, to move his Majeſty to decline his accuſation, being of that nature, that if it were well founded, it could only be ſupported by the teſtimony of his Majeſty, from converſations which had paſſed between the King and the Earl. On the next day the Lords propoſed the following queſtions to the judges, which they were deſired to take into their conſideration, and to deliver their opinions to the Houſe.

1ſt. Whether in caſe of treaſon or felony, the King's teſtimony is to be admitted or not.

2d. Whether words ſpoken to the prince, who after is King, make any alteration or not.

On

* Vide Journals of the Houſe of Lords.

On the 13th of May, the day appointed for the judges to deliver their opinions, the Lord Chief Juſtice informed the Houſe, that he had received a meſſage from Mr. Attorney General, viz. "That it was "his Majeſty's pleaſure, that we ſhould "forbear to give an anſwer to theſe gene-"ral queſtions, but that in any particular "caſe or queſtion, which may ariſe in the "courſe of the cauſe of the Earl of Briſtol, "and wherein the Lords deſire our opini-"ons, that upon mature deliberation, we "deliver the ſame according to our con-"ſciences. His Majeſty aſſuring himſelf, "that in all things, we will deliver our-"ſelves with that juſtice and evenneſs, "between his Majeſty and his people, as "ſhall be worthy of our places." But as the trial was not proſecuted before the parliament was diſſolved, I apprehend that no judicial anſwer has ever yet been given to theſe important queſtions.

But the whole of the conduct of the Houſe of Lords, the Attorney General and the

the Judges, preclude all ſuppoſition that the Houſe had any diſcretion, with regard to the admiſſibility of the teſtimony of the King. And I ſhould preſume, that for various reaſons no doubt can be entertained, even if the King alone ſhould ſee treaſon, murder, or any other crime committed, that neither in the Houſe of Lords, nor in any other court in this kingdom, could he be admitted a witneſs, to ſupport a criminal proſecution *.

In the year 1631, the Earl of Caſtlehaven was tried before the court of the Lord High Steward, as a principal in aſſiſting in a rape upon his own wife. And one queſtion referred to the judges was, "Whether the wife in this "caſe, might be a witneſs againſt her huſ-"band for the rape. The anſwer was, ſhe "might. For ſhe was the party wronged, "otherwiſe ſhe might be abuſed. In like "manner

* Three reaſons may be briefly ſtated. He would be a witneſs in his own cauſe; he would be intereſted in he forfeitures and fines; and he would be exempt from the penalties of perjury.

"manner a villain (Vaſſal), might be a "witneſs againſt his Lord in ſuch caſes*". The legality of this anſwer has been controverted, but from its generality it is evident, that it was not intended to be confined to the court of the Lord High Steward.

In 1699, the Earl of Warwick was tried upon an indictment before the Houſe of Lords for the murder of Richard Coote, Eſq; he offered in his defence, a witneſs who had been convicted of manſlaughter, in killing the deceaſed Coote, but who had not been burnt in the hand, nor obtained a pardon under the great ſeal, though the pardon had actually paſſed the privy ſeal. The Lords far from thinking they had any diſcretion to admit him, if he was not legally competent, referred his caſe to the conſideration of the Judges, who were unanimouſly of opinion, that he was an inadmiſſible witneſs, upon which he was immediately rejected†. No caſe can be imagined

* Harg. St. Tr. 1 vol. 387. † Ibid. 5 vol. 170.

imagined of greater hardſhip, or where the letter of the law could be more repugnant to reaſon and ſubſtantial juſtice. From the rejection of this evidence, the Earl might have been found guilty of the foul crime of murder; he was convicted of manſlaughter, and if he had had the benefit of this perſon's teſtimony, he might perhaps have been honourably acquitted. The diſtinction was abſurd and diſgraceful in the extreme; for one would have ſuppoſed, that if he had been branded in the hand, his condition would have been more infamous, and his teſtimony leſs worthy of credit; but an act of Parliament having declared, that no one convicted of felony, ſhould be admitted a witneſs, until he had obtained his Clergy, and had been burnt in the hand, this ſtatute equally operated upon all courts, the higheſt and the loweſt, and this monſtrous abſurdity, ſo ſhocking to one's feelings and underſtanding, could only be extinguiſhed by the authority of the Legiſlature, from which it had originated.

But it continued to be the law of this country, from the 18th year of Queen Elizabeth, to the 19th year of his preſent Majeſty's reign †. This witneſs was rejected by the Houſe of Lords, at a time, when, if he had been admitted, he would not have been ſworn; for when Lord Mohun, the next day was tried for the ſame murder, the Lord High Steward addreſſed his firſt witneſs thus, "Though you are "not upon your oath, yet you are as much "obliged in juſtice and conſcience to "ſpeak the exact truth, as if you was upon "your oath; therefore have a care what "teſtimony you give." When this noble Lord had the misfortune to be tried for the murder of William Mountford, a few years before, the Marquis of Carmarthen the Lord High Steward, thus addreſſed him, "My Lord, you are a very young man, "and therefore it is to be hoped, you can-"not ſo early have had your hands in "blood, and the ſame reaſon, becauſe you "are ſo young, may perhaps make you "con-

† 18 Eliz. c. 7.—19 Geo. 3. c. 19.

" conceive, that you are under ſome greater " diſadvantage in making your defence, " than you would be, if your experience " had been longer; but to remove any " miſapprehenſion you can have of that " kind, it is very proper to put your " Lordſhip in mind, that you have the " good fortune to be tried for this fact in " full Parliament, where no evidence will " be received, but ſuch as muſt be mani- " feſt and plain, beyond all contradiction, " ſo that you have nothing to fear here, " but your own guilt ‡."

At the trials of the Earl of Warwick, and Lord Mohun, for the murder of Mr. Coote, Lord Somers preſided as Lord High Steward; though he was the principal author of the revolution, yet that great lawyer never adopted the modern new-fangled falſe diſtinctions between the law and the conſtitution; but he addreſſed the Earl of Warwick in the following elegant and emphatic language. " Your Lordſhip is

 " called

‡ St. Tr. 4 vol. 512.

" called upon to anſwer this charge before " the whole body of the Houſe of Peers, " aſſembled in parliament. It is a great " misfortune to be accuſed of ſo heinous " an offence, and it is an addition to that " misfortune, to be brought to anſwer as " a criminal before ſuch an aſſembly, in " defence of your eſtate, your life, and " honour; but it ought to be a ſupport to " your mind, ſufficient to keep you from " ſinking under the weight of ſuch an ac- " cuſation, that you are to be tried before " ſo noble, diſcerning, and equal Judges, " that nothing but your own guilt can " hurt you; no *evidence* will be received, " but what is *warranted* by law; no weight " will be laid upon the evidence, but what " is agreeable to juſtice." Here that illuſtrious character nobly diſcriminates between the admiſſibility of evidence warranted by law, and that diſcretion and ſubſtantial juſtice, which each was bound to exerciſe and diſcharge, according to the effect and operation of that evidence upon his conſcience.

In

In Lord Macclesfield's impeachment, the counsel for the noble Earl called a witness to prove what he had heard 35 years before, from a person who was dead. The managers objected to the evidence, upon which the Earl of Macclesfield, who had lately been Lord Chancellor of Great Britain, observed. "My "Lords, what we are giving evidence of, is "of a thing transacted 35 years ago, the "parties are all dead; he is about to give you "an account of what he did, and was said to "him at that time by his master in transacting that affair. If that person, that "said it, were now alive, to be examined "to it himself before your Lordships, it "would not be evidence without examining him, but if dead, what he said concerning this fact, may be given in evidence, it is concerning the party's own "act, and what he told him at the time "it was doing. Therefore we hope they "will not oppose this evidence, which in "the nature of the thing is all that possibly can be now given." Lord Trevor rose and observed, "If there be a differ-

"ence

" ence in opinion between the noble Lord " and the managers, they muſt withdraw, " I will tell my opinion, that ſuch an " hearſay evidence is no evidence *." Upon which it was no longer perſiſted in; but in this caſe, where the noble Earl and his counſel were making experiments, there is not the leaſt intimation that the Houſe of Lords were not bound by the rules of the inferior courts.

In the Ducheſs of Kingſton's trial, upon an indictment before the high court of parliament, two points of evidence were determined, and by ſeveral learned lords were argued upon thoſe principles, which are common to every court in the kingdom; one was, that a ſurgeon, who obtains any information, even of the moſt delicate nature, as of the birth of a child, in conſequence of his profeſſion, has no privilege, but is bound to diſcloſe it in a court of juſtice; another was, that a noble Lord, to whom the moſt confidential communi-

* H. St. Tr. 644.

munications had been made, could not from any etiquette of honour, or motives of delicacy, be protected from revealing them, as far as was neceſſary for the purpoſes of juſtice. And when the counſel ſhewed a willingneſs not to wound the feelings of the noble Lord, and to wave the teſtimony; Lord Radnor declared, "I "am afraid your Lordſhips, by your ac- "quieſcence have admitted a rule of pro- "ceeding here, which would not be ad- "mitted in any inferior court in the king- "dom. I deſire therefore to aſk the noble "Lord, whether he knows any matter of "fact relative to that marriage." Lord Barrington anſwered, "My Lords, if I do, "I cannot reveal it, nor can I anſwer the "queſtion without betraying private con- "verſation." But after ſome debate, that noble Lord was obliged to diſcloſe all the private converſation which he remembered upon the ſubject §.

It it related of Xenocrates the Athenian, that

§ H. St. Tr. 11 vol.

that ſo high was his character for honour, and veracity among his countrymen, that when he was produced as a witneſs, the judges would not permit him to be ſworn; but this is a compliment, which cannot be paid by any Engliſh court of juſtice. Our maxim is, *In judicio non niſi juratis creditur.* And though the conſtitution repoſes ſuch confidence in the purity and integrity of the peers, as to permit them to give their verdict upon their honour, yet in their own Houſe, and in every other court, they muſt give their teſtimony upon oath. Lord Barrington was ſworn in the Ducheſs of Kingſton's trial, and the Biſhop of Oxford in Lord Macclesfield's *."

I have

* If any peer ſhould embrace the tenets of the Quakers, it would be very clear, that in no inferior court in a criminal caſe could he be heard upon his honour, or affirmation. It has been determined after much ſolemn argument, that though the evidence of an Atheiſt cannot be received, as the religious ſolemnity of an oath can have no obligation upon his mind; yet the evidence upon oath of men of every religion, who believe in a Supreme Being, or a Governor of the Univerſe, may be received in an Engliſh court of juſtice, and that the oath may be adminiſtered according to the ceremonies

I have now enumerated all the queſtions upon evidence, which I have found diſcuſſed in trials before the Houſe of Lords, and

ceremonies of their religion. Upon the authority of this deciſion, I conceive there could be no doubt but the depoſition of a Gentoo might be received in the preſent impeachment. The deciſion is that of *Omychund* v. *Barker*, *in* 1. *Atkyns's Reports*, 21, where it appears, that purſuant to an order of the court of Chancery, of the 4th of *December*, 1739, a commiſſion went to the *Eaſt Indies*, and on the 12th of *February*, 1742, the commiſſioners certified, that among other witneſſes for the plaintiff, they had examined *Ramkiſſenſeat*, and *Ramchurnecooberage*, and ſeveral others, ſubjects of the Great Mogul, being perſons who profeſs the Gentoo religion, and that they were ſolemnly ſworn in the following manner, *viz.* "The ſeveral perſons being before "us, with a Bramin or Prieſt of the Gentoo religion, "the oath preſcribed to be taken by the witneſſes was "interpreted to each witneſs reſpectively; after which "they did ſeverally with their hands touch the foot of "the Bramin or Prieſt of the Gentoo religion, being "alſo before us with another Bramin or Prieſt of the "ſame religion, the oath preſcribed to be taken by the "witneſſes was interpreted to him; after which *Neen-*"*deram Surmah*, being himſelf a Prieſt, did touch the "hand of the Bramin, the ſame being the uſual and "moſt ſolemn form, in which oaths are moſt uſually ad-"miniſtered to witneſſes who profeſs the Gentoo reli-"gion, and the ſame manner in which oaths are uſually "adminiſtred to ſuch witneſſes in the courts of juſtice, "erected by letters patent of the late King at *Cal-*"*cutta*."

and I have ſtated them in order to ſhew that they have been determined upon thoſe general principles of law, which prevail in every other court in the kingdom; and that in none of thoſe important caſes is there any ſuggeſtion, that the peers poſſeſſed a diſcretionary authority with regard to evidence.

In the 8th year of William 3. a bill of indictment for high treaſon was found againſt Sir John Fenwick; but before he was brought to trial, one of the witneſſes upon whoſe evidence before the grand jury the bill was found, diſappeared, ſo that Sir John Fenwick muſt neceſſarily have been acquitted in any court of law. But a bill of attainder was paſſed, in which it was enacted, that Sir John Fenwick ſhould be ſubject to all the penalties of a conviction in a court of juſtice, and in conſequence of this act of parliament he ſuffered death. In the examination of witneſſes before the Houſe of Commons, previous to the paſſing of the bill, there was great debate, whether

the Houſe was bound by the rules of evidence. The ſpeeches of the principal ſpeakers are preſerved in the 4th volume of the State Trials; among theſe is that of Mr. Methuen, who I have no doubt is Paul Methuen Eſq; who was afterwards Queen Anne's ambaſſador to Liſbon, and who concluded an important treaty with Portugal; he was alſo high in office in the next reign of George the Firſt. The ſpeech, which is aſſigned him, proves him to be a man of great abilities, and deſerving of the character, which is given him in the dedication of the 7th volume of the Spectator.

He diſtinguiſhes between bills of attainder, and caſes of judicature in parliament, by obſerving, that " 'Tis ſaid you are try-
" ing of Sir John Fenwick, that you are
" judges, and that you are both judges
" and jury, and that you are obliged to
" proceed according to the ſame rule,
" though not the methods of Weſtminſter
" Hall, *ſecundum allegata et probata*. But

" the ſtate of the matter, as it appears to
" me, is, that you are here in your legiſ-
" lative power, making a new law for at-
" tainting of Sir John Fenwick, and for
" exempting his particular caſe, and for
" trying of it, (if you will uſe that word,
" though improperly) in which caſe, the
" methods differ from what the law re-
" quires in other caſes, for this is never
" to be a law for any other afterwards.
" Methinks this being the ſtate of the caſe,
" it quite puts us out of the method of
" trials, and all the laws that are for limit-
" ing rules for evidence at trials in Weſt-
" minſter Hall, *and other judicatures*, for
" it muſt be agreed, *the ſame rules of evi-*
" *dence* muſt be obſerved *in other places* as
" well as Weſtminſter Hall, *I mean Im-*
" *peachments*, and it has always been ſo
" taken *." Here then is the expreſs autho-
rity of a man of learning and talents, and
which was not contradicted by any gentle-
man that followed him. And it would
have been of great importance to thoſe,
who adopted that ſide of the debate, to
have

* St. Tr. 4 vol. 310.

have corrected him with regard to impeachments, and caſes of judicature; for if the two houſes of parliament are not bound by the rules of evidence in judicial proceedings, *a multo fortiori argumento*, they would not be bound in their legiſlative characters.

I have now ſtated all the authorities which I have met with in the courſe of this inveſtigation, and I have never any where diſcovered the leaſt intimation that the Houſe of Lords could deviate from the rules of evidence obſerved by other courts, except in an impeachment, which perhaps the generality of my readers will be beſt acquainted with; I mean the impeachment of Quinbus Fleſtrin, the Man Mountain, intended to have been tried in the High Court of Parliament of Lilliput; after an impeachment was reſolved upon, and articles drawn up againſt Quinbus Fleſtrin, for having extinguiſhed the flames in the Empreſs's apartment, in a manner, which by the laws of Lilliput, amounted

to

to high treaſon; he was ſecretly informed of it by one of his party in the Cabinet, who added, "That his ſacred Majeſty and "council, who are your judges, were in "their own conſciences fully convinced of "your guilt, which was a ſufficient argu-"ment to condemn you to death, without "the formal proofs required by the ſtrict "letter of the law." Though there can be little doubt but Swift intended this humourous impeachment as a ſatire upon ſome of the impeachments, which were numerous in the reign of Queen Anne, yet I conceive that this part of his wit was unprovoked, and that no thought had ever occurred to the managers of thoſe impeachments, to diſpenſe with the formal proofs required by the ſtrict letter of the law. But it is moſt probable that by this obſervation the ſatiriſt alluded to the bill of attainder of Sir John Fenwick. Indeed it is a lamentable reflection, that the æra of our liberty, the ſplendid page of our hiſtory, ſhould be ſo ſoon ſtained by ſuch a black inſtance of tyranny and perſecu-

tion,

tion. Perhaps no caſe has yet occurred in this country, of ſuch terrific magnitude, that the whole machine of government ſhould be raiſed to cruſh an individual. The fortune, life, and honour of a Britiſh ſubject, without legal proceſs, or legal proofs, are condemned by the vote of a majority. But *ita tetra ſunt, ut ea fugiat et reformidet oratio.*

But notwithſtanding the two houſes of parliament have deviated from the rules of evidence, in paſſing acts to deprive the ſubject of his life and honour, yet it is now the conſtant and invariable practice of both houſes of parliament, in every divorce and turnpike bill, to examine witneſſes according to the law of evidence. One of the counſel for the Biſhop of Rocheſter, cites a memorable and noble inſtance of the Lord Digby, and which clearly proves, what evidence he thought ought to be adduced to ſupport an impeachment. I ſhall repeat the words of the learned gentleman, Mr. Wynne. " Lord Digby had been one

" of

" of the moſt violent managers in the im-
" peachment of the Lord Strafford, and
" yet when that proceeding was waved,
" and a bill of attainder brought in, he
" ſpoke as violently againſt it: though
" he was ſtill of opinion, (he ſaid) that
" that Lord was the ſame dangerous mi-
" niſter, and great apoſtate to the com-
" monwealth, who muſt not expect to be
" pardoned in this world, till he was diſ-
" patched to another, yet he had rather
" loſe his hand, than put it to that diſ-
" patch. He put them in the mind of
" the difference, between proſecutors and
" judges, and how unbecoming that fervor
" was in them, now they were judges
" which perhaps might be commendable
" in them as proſecutors, that when he
" gave his conſent to the accuſation, he
" was aſſured his crimes would have been
" fully and *legally* proved, which if they
" had, he could have condemned him with
" innocency, as he had proſecuted him
" with earneſtneſs; but as the caſe then
" appeared, no man could ſatisfy his con-
" ſcience

" ſcience in the doing of it. The parlia-
" ment 'tis true had a judicial and legiſ-
" lative capacity, the meaſure of the one
" ought to be legally juſt, the other poli-
" tical and prudential; but theſe two ca-
" pacities were not to be confounded in
" judgment, they were not to piece up
" (ſays he) the want of legality by matters
" of convenience, to the ruin of a man by
" a law made *ex poſteriori*."

I think an argument has been urged, from the peculiar circumſtances of the preſent impeachment, which is ſomething of this nature, viz. that, where the crimes have been committed at ſo great a diſtance from the place of trial, and when ſo great an interval of time has elapſed, if you ſhould expect the ſame ſtrict proofs, as in ordinary caſes, the greateſt criminals might eſcape with impunity. Proteſting, as I ever ſhall, that the laws of evidence are as unextendible and incompreſſible as adamant, but granting, for the ſake of argument, that they could admit of a variation,

I ſhould contend, and I truſt with ſucceſs, that from the reaſon aſſigned, the concluſion ought to be directly the reverſe, and that the ſpirit of both Engliſh law, and Engliſh liberty, under ſuch circumſtances, would demand their reſtriction, rather than their relaxation. For according to the principles of our law, caution and ſcrupuloſity ought to be ſhewn in the admiſſion of evidence, in proportion to the difficulty which the defendant has to repel it, if it is fabricated. This is the principle, as I have mentioned before, of all ſtatutes of limitation, which provide, that after a certain time, no evidence whatever ſhall be admitted to affect the defendant. And the ſame reaſon, which induced the legiſlature to enact, that no ſubject ſhould be convicted of treaſon, but upon the teſtimony of two witneſſes, induced them alſo to declare, that no one ſhould be proſecuted for any treaſon, except for an attempt to aſſaſſinate the King, unleſs he is indicted within three years after the commiſſion of the crime*.

Lord

* 7 W. 3. c. 3.

Lord Chief Juſtice Hale, ſtrongly urges attention to this principle in the trial of rapes. "It is true, ſays he, rape is a moſt "deteſtable crime, and therefore ought "ſeverely and impartially to be puniſhed "with death; but it muſt be remembered, "that it is an accuſation eaſily to be made, "and hard to be proved, and harder to be "defended by the party accuſed, though "never ſo innocent.

"I ſhall never forget a trial before my-"ſelf of a rape in the county of Suſſex."

"There had been one of that county "convicted and executed for a rape in "that county before ſome other judges, "about three aſſizes before, and I ſuppoſe "very juſtly: ſome malicious people ſeeing "how eaſy it was to make out ſuch an ac-"cuſation, and how difficult it was for the "party accuſed to clear himſelf, furniſhed "the two aſſizes following with many "indictments of rapes, wherein the parties "accuſed with ſome difficulty eſcaped."

He then relates a caſe which happened at the ſecond aſſizes following; (it is rather too long to give the whole of it in his own words,) "Where an antient wealthy man of about ſixty-three years old, was indicted for a rape, which was fully ſworn againſt him by a young girl of fourteen years old, and a concurrent teſtimony of her mother and father, and ſome other relations. The antient man, when he came to his defence, alledged that it was true the fact was ſworn, and it was not poſſible for him to produce witneſſes to the negative;" but the priſoner then convinced the court and jury, that he had long laboured under a diſorder, which rendered him perfectly incapable of committing a crime of that nature. Lord Hale then relates other ſimilar caſes, and obſerves, "I only mention theſe inſtances, that we may be the more cautious upon trials of offences of this nature, wherein the court and jury may with ſo much eaſe be impoſed upon, without great *care and vigilance*; the heinouſneſs of the offence many times tranſporting the judge and jury with ſo much

much indignation, that they are over-haſtily carried to the conviction of the perſon accuſed thereof, by the confident teſtimony, ſometimes of malicious and falſe witneſſes *."

What my Lord Chief Juſtice Hale recommends in theſe caſes, is equally applicable to every other ſpecies of accuſation, viz. that the *care and vigilance* of the court ought to be greater according to the eaſe of fabricating evidence, and the difficulty in repelling it †. But beſides this ſhield which juſtice, with a parental care, ſpontaneouſly preſents againſt the deſigns of wickedneſs, perhaps ſome caution might be neceſſary, to check a natural propenſity in the mind of man to magnify whatever we know imperfectly, or where we have no fear of contradiction. This, though perhaps a common-place obſervation, ſeems to have been a favourite ſentiment of one

* P. C. 1 vol. 636.

† There is one melancholy inſtance in an impeachment, where a venerable peer, Lord Stafford, loſt his life by the perjury of Titus Oates and his infernal aſſociates.

one of the moſt comprehenſive minds of antiquity; I mean Tacitus, *Ut quis ex longinquo revenerat, miracula narrabant, vim turbinum, et inauditas volucres, monſtra maris, ambiguas hominum et belluarum formas.* An. 2. 24.

Cuncta, ut ex longinquo, aucta in deterius adferebantur. An. 2. 82.

Juvit credulitatem nox, et promptior inter tenebras affirmatio. Ib.

Gnarus majora credi de abſentibus. Hiſt. 2. 83.

Omne ignotum pro magnifico. Vita Agric. 30.

Theſe authorities, I truſt, will ſuffice to convince us, that we ought not to ſupply by imagination the deficiency of legal evidence, and that it is not conſonant either to juſtice or ſound reaſon, to extend the laws of evidence, or to be content with a ſlighter degree of proof, becauſe the ſcene of action is laid in India. But to obviate the complaint of the want of the beſt evidence in trials, for crimes committed in India,

India, the parliament has provided by an act paſſed in the 13th of the preſent King, that the Speaker of the Houſe of Commons, or the Chancellor, may ſend a commiſſion to India, for the examination of witneſſes, and that depoſitions obtained in conſequence ſhall be good evidence, in any parliamentary enquiry in this country.

We frequently hear it obſerved, that it is the law of England, that when you cannot obtain the beſt evidence, you ſhall receive the next beſt evidence, which the nature of the caſe will admit. This certainly is the law of England. But it ſignifies nothing more than that if you have not the beſt *legal* evidence, you ſhall reſort to the next *legal* evidence. Evidence may be divided into primary and ſecondary, but the ſecondary evidence, is as accurately defined and limited by the law as the primary; but you ſhall never reſort to hearſay, to intereſted witneſſes, to copies of copies, &c. &c. becauſe from no circumſtances whatever can they ever become legal evidence; if there are exceptions, they

are

are ſuch as are as much recognized by the law as the general rule; and where boundaries and limits are eſtabliſhed by the law for every caſe, which can poſſibly occur, it is immaterial what we call the rule, and what the exception.

With regard to the preſent impeachment, I have heard an argument of this kind advanced, that though our rules of evidence may be very fit and proper to try a murder, rape, robbery, or a ſingle action, they are perfectly unavailing and inapplicable, when the whole hiſtory of a man's life is put in iſſue; and that this is a caſe far beyond the comprehenſion of the contracted vulgar minds of lawyers. By thus enveloping the argument in a myſtery, which we have no power to penetrate, if it does not give pretenſions to a victory, it at leaſt prevents the diſgrace of a defeat; it brings to one's mind, thoſe heroes in Homer, who, when they are hard preſſed, are carried from the field by ſome guardian Deity, wrapt in a cloud. But as far as I can comprehend the premiſes of this

this argument, I ſhould again draw a different concluſion, and ſhould rely upon that obvious principle which I have mentioned before, that the leſs prepared a defendant can be to repel an attack, the more ſcrupulous and circumſpect ought his judges to be in their attention to the attempts of the aſſailant. But without reſorting to this obſervation, which probably will be treated with contempt, as a principle of ſpecial pleading, I ſhould contend, that with reſpect to the law of evidence, it is perfectly immaterial whether one act or ten thouſand acts are put in iſſue. The hiſtory of a man's life is a connuation of ſingle acts, and each act muſt be proved by the ſame deſcription of evidence, as if upon that act alone depended the acquittal or conviction of the defendant. Whether it is the immediate criminal act, or an act which affords an inference or preſumption of guilt, the proof muſt be exactly the ſame. If we are to prove that the priſoner rode a white horſe (or any other ſimilar circumſtance) the ſame day, on which a robbery was com-

mitted by a highwayman mounted on a white horſe, we muſt prove it preciſely by the ſame deſcription of witneſſes and evidence, as we muſt prove the act of robbery itſelf. So if we ranſack the hiſtory of a man's life, whatever actions we bring forward, whether criminal in themſelves, or inferences of criminality, theſe muſt all be proved by the ſame ſort of evidence. If we are to prove that he iſſued a murderous mandate, like King Tarquin, by cutting off the head of a poppy, we muſt prove that act by preciſely the ſame evidence, by which we ſhould have proved that he cut off the head of a man; perhaps it might require ſome additional facts, or circumſtances to explain it, or to ſhew that it was the cauſe of the criminal effect.

What I have advanced ſo far upon circumſtantial evidence is this, viz. that facts, from which guilt is to be inferred, muſt be eſtabliſhed by the ſame ſpecies of evidence, as the immediate or principal acts of criminality; but the inference to be collected from

from thoſe facts, muſt be left in every court to the judgment and conſciences of thoſe, whoſe province it is to pronounce upon the guilt or innocence of the party accuſed. Mr. Baron Mounteney, in ſummoning up the evidence, in the trial between James Anneſley, Eſq; and the Earl of Angleſea, makes this obſervation, "I remember to have heard it laid down, "by one of the greateſt men who ever "ſat in a court of judicature, viz. that "circumſtances were in many caſes of "greater force, and more to be depended "upon, than the teſtimony of living wit-"neſſes," "Witneſſes, gentlemen, may ei-"ther be miſtaken themſelves, or wickedly "intend to deceive others; God knows, "we have ſeen too much of this in the "preſent cauſe on both ſides. But circum-"ſtances, gentlemen, naturally and neceſ-"ſarily ariſing out of a given fact cannot "lie *."

We hear this obſervation every where echoed, "circumſtantial evidence is the beſt for

* Har. St. Tr. 9 vol. 426.

for circumſtances cannot lie." But if we would give ourſelves the trouble to beſtow a little conſideration upon the ſubject, I think we ſhall be convinced that circumſtantial evidence is not the beſt, and that circumſtances can lie. There are circumſtances which cannot lie, where the concluſion or inference is neceſſary and unavoidable, but where the concluſion or inference is contingent, circumſtances may lie, that is, we may draw an erroneous concluſion from the given facts. The learned Matthæus clearly deſcribes this diſtinction; *Argumentum porrò neceſſarium vel contingens eſt: neceſſarium, cujus conſequentia neceſſaria eſt, veluti coiviſſe eam quæ peperit: contingens, cujus conſequentia probabilis eſt, veluti cædem feciſſe, qui cruentatus eſt; Atalantam virginem non eſſe, quod cum adoleſcentibus ſpatietur ſola per ſylvas.* In the firſt caſe, one fact is a certain demonſtration of the other; but in the ſecond, the circumſtances muſt frequently lie, when they charge with murder, a perſon ſtained with blood, or Atalanta, from ſuch companions and conduct,

with

with a want of chaſtity. But he proceeds to obſerve, *contingentia verò quanquam ſingula fidem non faciant, plura tamen conjuncta crimen manifeſtare poſſunt. Rem uno atque altero exemplo declarabimus. Occiſus eſt Kalendis Mœvius: Titius perempti inimicus fuit; eidem ſæpius non ſolum interminatus, ſed et inſidiatus eſt. Cum deprehenderetur iiſdem Kalendis in loco cædis cruentatus, cum gladio cruento, ad menſuram vulneris facto, toto vultu expalluit, interrogatus nil reſpondit, trepidè fugit. Hic ſingula quidem argumenta infirmiora ſunt, univerſa tamen cædis auctorem Titium evidenter deſignant, rectèque Duarenus dixit, non dubitaturum ſe hunc reum carnifici jugulandum dare.* Tit. 15. c. 6. Yet Duarenus might have condemned and executed an innocent man. Every one of theſe circumſtances muſt be proved by poſitive witneſſes, who may be either wicked or miſtaken; but even if they are pure and correct, the concluſion we draw from the facts diſcloſed may be erroneous.

So

So that in circumſtantial evidence there muſt of neceſſity be more chances for error than in poſitive evidence. If any number of witneſſes ſhould ſwear, they ſaw the priſoner draw a reeking ſword from the ſide of a dead man, we have not the ſame degree of certainty, that he either murdered or killed him, as if the ſame witneſſes had ſworn they had ſeen him run it through his body. It affords a violent preſumption, but ſtill it might have been the friendly act of an innocent man, who had accidentally paſſed that way after the murder was committed; or even if it was the priſoner's own ſword, it might have been ſnatched from his ſide and plunged into the body of the deceaſed by ſome one, who had eſcaped, or the deceaſed might have borrowed it, and have fallen upon it himſelf. All human teſtimony is nothing more than a high probability, and it is true that circumſtantial evidence, in one caſe, may produce a higher degree of it, or more nearly approach to certainty, than

direct

direct and positive evidence in another*. Human testimony is so far distinct from cer-

* That both positive and circumstantial evidence may fail, will appear from the following cases, the first is in the Chronicle of the Gentleman's Magazine for Oct. 1772. The other is from the 5th vol. of Causes Celebres, p. 438, where several more such stories are related.

Sept. 14, 1772. Came on at the sessions in the Old Bailey, the trial of one Male, a barber's apprentice, for robbing Mrs. Ryan, of Portland-street, on the highway, on the 17th of June last. The witnesses swore positively to the identity of the lad, and the whole court imagined him guilty. He said nothing in his defence, but that he was innocent, and his evidences would prove it. His evidences were the books of the court, to which reference being made, it appeared that on the day and hour when the robbery was sworn to be committed, the lad was on his trial at the bar where he then stood, for another robbery, in which he was likewise unfortunate enough to be mistaken for the person, who committed it; on which he was honourably acquitted.

Voici un autre fait, dont j'ignore l'époque, & qui m'a été transmis par la tradition. Avant qu'on eût rebâti cette longue suite de maisons qui bordent la place saint Michel à Paris, en face de la rue sainte Hyacinthe, une marchande veuve & âgée occupoit, au même endroit, une petite boutique, avec une arrière-boutique, où elle couchoit. Elle passoit, dans le quartier, pour avoir beaucoup d'argent amassé. Un seul garçon composoit, depuis long-tems, tout son domestique. Il couchoit à un quatrième étage, dont l'escalier n'avoit point de communication avec l'habitation de sa maîtresse; il étoit obligé, pour s'y rendre, de sortir dans la rue; & lorsqu'il

certainty, that it admits of all the degrees of probability, and by ſome philoſophers has

qu'il s'alloit coucher, il fermoit la porte extérieure de la boutique, & emportoit la clef, dont il étoit ſeul dépoſitaire.

On voit, un matin, la porte ouverte plutôt qu'à l'ordinaire, ſans qu'on remarquât aucun mouvement qui annonçât que la marchande, ou ſon garçon fuſſent levés. Cette inaction donna de l'inquiétude aux voiſins. Cependant on ne remarque aucune fracture à la porte: mais on trouve un couteau enſanglanté, jetté au milieu de la boutique, & la marchande aſſaſſinée dans ſon lit, à coups de couteau. Le cadavre tenoit, dans une main, une poignée de cheveux; & dans l'autre une cravate. Auprès du lit, étoit un coffre qui avoit été forcé.

On ſaiſit le garçon de boutique; il ſe trouve que le couteau lui appartient. La cravate que tenoit la marchande étoit à lui. On compare ſes cheveux avec ceux qui étoient dans l'autre main; ils ſe trouvent les mêmes. Enfin la clef de la boutique étoit dans ſa chambre; lui ſeul avoit pu, moyennant cette clef, entrer chez la marchande, ſans fracture. D'après des indices ainſi cumulés, & ſi concluants, on lui fait ſubir la queſtion; il avoue, il eſt rompu.

Peu de tems après, on arrête un garçon marchand de vin, pour je ne ſçais quel autre délit. Il déclare, par ſon teſtament de mort, que lui ſeul eſt coupable de l'aſſaſſinat commis à la place ſaint Michel. Le cabaret où il ſervoit étoit attenant à la demeure de la marchande égorgée. Il étoit familiérement lié avec le garçon de boutique de cette marchande; c'étoit lui qui mettoit ordinairement ſes cheveux en queue; quand il le peignoit,

has been conſidered according to the mathematical principles of the doctrine of chances and combinations. In the ſecond volume of the Miſcellanea Curioſa, the firſt paper (ſaid to be written by Dr. Halley) is entitled, *A Calculation of the Credibility of Human Teſtimony*, in which that learned philoſopher ſhews, that if we could determine the probability of the credit of each witneſs, the ſum or product of the whole teſtimony of any number of witneſſes, or the probability of the guilt or innocence of a priſoner, would be a ſtrict and exact mathematical calculation. One propoſition clearly demonſtrated by thoſe principles, is, that the weight or probability of human teſtimony, given any degree of credibility to the witneſſes, riſes in a much higher ratio or proportion than the number of the witneſſes; ſo that where the probability of

noit, il avoit ſoin de ramaſſer ceux que le peigne détachoit, & dont il avoit peu-à-peu formé la poignée qui s'étoit trouvée dans les mains du cadavre. Il ne lui avoit pas été difficile de ſe procurer une des cravates & le couteau de ſon camarade, & de prendre, avec de la cire, l'empreinte de la clef de la boutique, pour en fabriquer une fauſſe.

of the truth of each witneſs is to the probability of his falſehood, from error or corruption, as 9 to 1; if there are two, of that degree of credit, it is 99 to 1, that their teſtimony is true, or that they are not both wrong; if three, 999 to 1, and ſo on. So if fifty ſuch witneſſes ſhould concur, the probability of their teſtimony would be a number expreſſed by 50 nines to 1; and that ſuch great odds ſhould loſe, would by many be regarded as a greater miracle than if the ſun ſhould appear at midnight, or the dead be raiſed to life*. Some ingenious friends of mine, accuſtomed to diſquiſitions of this nature, have drawn this concluſion from theſe principles, viz. that no degree of negative teſtimony merely, can ever totally deſtroy the probability of affirmative teſti-

* Mr. Hume's celebrated argument againſt miracles, ſeems to me to amount to nothing more than his own aſſertion, that if any number of men whatever ſhould tell him they had ſeen a miracle, he would not believe them. But a religious mind would be more inclined to think that the Creator of the Univerſe, for wiſe purpoſes, might ſuſpend or reverſe the ordinary operations of nature, than that ten thouſand men ſhould concur in a falſehood.

teſtimony; as for inſtance, if one man aſſerts a fact, and another of equal credit denies it, ſome probability remains on the ſide of the affirmative; as if one ſhould affirm that A had a legacy by a certain will, and if another ſhould aſſert he had read the will, and that there was no legacy for A, yet before A himſelf ſaw the will, upon this teſtimony he would give ſomething for his chance. If we ſhould ſuppoſe that the holder of any ticket in the lottery is informed by two men, each of whom is as much in the habit of telling lies as truth, ſo that it is an even chance what each aſſerts is true or falſe, and if one ſhould declare that he heard that ticket called a prize of 1000£. the other that he heard it called a blank, from this teſtimony the chance of that prize would be worth 250£. Or if we ſuppoſe that from the morning of a certain day, an underwriter would inſure a ſhip at a premium of 10 per cent. but that he was afterwards informed by two ſailors, each of whoſe credibility, we will eſtimate at an even chance as before, by

one that on that day he ſaw the ſhip ſpring a leak and ſink, by the other that he ſailed in company with that ſhip all the day, and that he left her in the evening ſafe and well; (here I preclude the ſuppoſition that both are correct, with regard to the fact, but one miſtakes the day) though theſe two teſtimonies are directly oppoſite, yet they by no means cancel each other, but they produce ſuch an effect, that if the underwriter is a man of prudence and calculation, he would not afterwards inſure that ſhip for leſs than $32\frac{1}{2}$ per cent.* The demonſtration of the ſolution of theſe caſes, I muſt leave to thoſe, who have an acquaintance with the principles, and a diſpoſition to be amuſed by ſuch ſpeculations.

But

* The higher the probability of each of ſuch oppoſite teſtimonies, the more nearly they will cancel each other, or leſs effect will be produced. But negation merely can never totally deſtroy affirmation, the effect of an affirmation can only be cancelled by an affirmation of ſomething of a directly oppoſite nature. If two perſons equally credible, ſhould aſſert, one that A had loſt 1000*l*. the other that A had won 1000*l*. then A's ſituation would be of the ſame value it was before; and gameſters and underwriters would not object to *ſtand in his ſhoes.*

But it muſt be admitted, as we cannot with any degree of certainty appreciate the credit of each witneſs, they are of little or no uſe in practice, though they are undeniably true in abſtract theory. But ſcience built upon a firm foundation, when properly conſidered, never can be at variance with good ſenſe. The moſt honourable acquittal leaves ſome unfavourable preſumption; for if the perſon tried ſhould have the misfortune to have one or two more ſuch acquittals for the ſame crime, it cannot be affirmed that that perſon will ſtand as clear from ſuſpicion, as if he never had been tried at all; therefore ſome probability muſt remain in favour of each accuſation, for the ſum of any number of nothings would ſtill be nothing *. A public trial is ſo great an injury to a fair character, that perhaps grand juries ought to be a little more cautious than they are.

It

* In looking into the Civil Law books, I find in Farinacius, Quæſt. LXV. n. 201. plus (inquiunt Doctores) creditur duobus affirmantibus quam mille negantibus, and Muſcardus calls this Regula illa vulgaris, vol. 1. conclu. 70.

It is ſo much the general underſtanding of mankind, that no evidence amounts to certainty, that the moſt conſcientious witneſſes in all times have been inclined to qualify their teſtimony by belief; the witneſſes of the preſent day perpetually *believe*, where they entertain no doubt, and Cicero tells us, *Veterum in teſtimoniis dicendis ea fuit diligentia ac religio, quod inſcientia multa verſaretur in vita, ut, arbitrari ſe, teſtes dicerent, etiam quod ipſi vidiſſent.* Lib. 4. Acad. Queſt.

In the conſideration of circumſtantial evidence, I have ſtated that the circumſtances muſt be proved by living witneſſes, or poſitive teſtimony; but there is a ſpecies of teſtimony which is called the *evidentia rei*; though this muſt be introduced by poſitive evidence, yet when produced, it ſpeaks for itſelf, and requires no explanation. Of this nature may be mentioned two caſes which have happened within a few years upon the Northern circuit; in one caſe a perſon was found ſhot by a ball,

and

and the wadding of the piſtol ſtuck in the wound, and was found to be part of a ballad called *Sweet Poll of Plymouth*, which correſponded with another part found in the pocket of the priſoner. The other alſo was a caſe of murder; and in the head of the deceaſed, there was a chip or ſplinter, which exactly fitted the cavity in a bludgeon, from which a piece had been lately broken, which bludgeon the priſoner carried in his hand when he was apprehended. Though this account of the two pieces of the ballad, and two pieces of the bludgeon muſt be proved by poſitive teſtimony, yet the court and jury are as competent judges of the fitneſs and correſpondence of the parts as the witneſſes. *Cui adſunt teſtimonia rerum quid opus eſt verbis?*

Theſe were certainly ſtrong corroborations of other circumſtances, but if they had ſtood alone, they would have deſerved little conſideration; for if the ballad and the bludgeon, had been thrown away by the murderers, they were objects likely to draw

draw the attention of an innocent man, who would naturally have put one in his pocket, and have carried the other in his hand.

Mr. Juſtice Blackſtone ſays that, "Light "or raſh preſumptions have no weight "or validity at all*." This I humbly conceive is not quite correct, ſingly they ought to have no validity upon the mind of the court, but every circumſtance which affords a preſumption, however light muſt be received; though it adds but a drop to the Ocean, it will have validity according to its weight, and a number of ſuch preſumptions may become of importance, or in the words of Matthæus, *Poſſunt diverſa genera ita conjungi, ut quæ ſingula non nocerent, ea univerſa tanquam grando reum opprimant.*

By theſe general obſervations upon the nature of poſitive and circumſtantial evidence, I may perhaps be thought to have wan-

* 3 vol. 371.

wandered from my ſubject; but I make this application of them, that whatever is abſtractedly and mathematically true in one place, muſt be ſo alſo in another, and that to aſſert, that peers and commoners ſhould have different rules of evidence, would be as great an outrage againſt all ſcience and ſenſe, as that they ſhould reckon good by different rules of arithmetic.

But ſomething of this kind has been advanced, that ordinary rules may be invariably obſerved in ordinary caſes, but caſes of extraordinary enormity of guilt from their very nature, ought not to be limited and confined by rules, which were only intended for common occurrences. Here again I ſhould draw directly the contrary concluſion *, and ſhould contend, if the law would admit of reſtriction or relaxation, that the evidence ought to be more ſtrict in proportion to the magnitude of the

* Being obliged to draw a different concluſion from every argument, that I have yet heard, I ſhould ſuſpect myſelf of prejudice or perverſeneſs, if I did not find that I was ſupported by the moſt reſpectable authorities.

the accuſation. In this I am fortified by an authority pregnant with good ſenſe, though I do not know to whom to aſcribe it, having omitted to mark the reference, when I extracted it, but it wants not the ſanction of a name. "It is a common but "well founded maxim, that in proportion "to the greatneſs of a crime, ought the "ſtrength of the proof of it to be. The "higher a crime is, and the deeper it "draws its conſequences, ſo much the "clearer and ſtronger ought the evidence "of it to be."

Whatever is more rare and extraordinary, either in the actions of mankind, or the appearances of nature, will require ſo much ſtronger proof to induce us to believe its exiſtence. When an incredible ſtory was related at Rome, it was a proverbial ſaying, I ſhould not believe it, though Cato ſhould aſſert it. It requires proof of a higher nature to convince us that a woman of the age of 51, like Lady Jane Douglas, had been delivered of twins, than

than that such an event had happened to a young woman of the age of 21 or 31.

It perhaps may be observed, that the peers, from their superior education, might safely be entrusted with evidence, which it would be dangerous to relate in the hearing of a jury; that their enlarged and enlightened minds would more easily discriminate the reality of truth, from what bore but the semblance of it. Education, it is true, in this Country is regarded as one of the best ornaments of nobility, and it is one of the first advantages of fortune to be able to purchase it in the greatest perfection. But as men of rank and fortune, generally associate with those, who are above the temptation of admitting even a thought of fraud and design, they are less experienced in the artifices of the world, and become liable to be imposed upon in proportion to the superior purity and integrity of their characters.

For oft tho' wisdom wake, suspicion sleeps
At wisdom's gate, and to simplicity
Resigns her charge, for goodness thinks no ill,
Where no ill seems.

But notwithſtanding theſe benefits from education and ſituation in life, yet it muſt be admitted, that the minds of a peer and a commoner are formed by the ſame hand, and conſtructed of the ſame materials. In the inferior courts, a priſoner or defendant may object to, or challenge, ſuch a number of the jury, as to be almoſt ſecure, that he is tried by his peers, who are *omni exceptione majores*, and who are brought from the neighbourhood, in order that they may be acquainted with the credit and characters of the witneſſes. But in the Houſe of Lords, no challenge can be admitted, and every peer, who has not been pronounced *non compos mentis* under a writ of *De idiotâ inquirendo*, or a commiſſion of lunacy, may decide upon the eſtate, life and honour of an Engliſh ſubject. And high and reverend as the law deems the honour of a nobleman, and as far as ambition and human paſſions will admit, it may be exempt from ſuſpicion and reproach; yet it will ſcarce be thought *Scandalum Magnatum*, if we ſhould ſuppoſe, that there are few impeach-

peachments, where the defendant would not wiſh the abſence of many of his judges, or that others might be ſubſtituted in their room. In the inferior courts, the law of evidence is the moſt eſſential part of that great bulwark of our liberty, the *Judicium Parium*, or the trial by jury. Each juryman is ſolemnly ſworn, that he will a true verdict give, and a true deliverance make, according to the evidence. Break down the barriers of evidence, and the ſecurity of that trial is gone. Though it is a common obſervation, that the mind of man is fond of authority, yet the Lords will check this propenſity in extending the admiſſibility of evidence, when they conſider that they are more particularly the objects of trial in their own court, and that by ſuch extenſion, each might periſh by his own law; or as it has been ſaid of bills of attainder, that, like Syſiphus's ſtone, it might roll back upon their own heads. The impeachment of a commoner before the Lords, may be conſidered in the ſame degree, the *Judicium Parium*, as the trial of a

peer

peer by a jury. The Lords, if not impeached, in all caſes of miſdemeanour, as for libels, perjury, &c. muſt be tried like a commoner before a jury, and the authorities are ſtrong, that a commoner never can be impeached before the Houſe of Lords for any crime higher than a miſdemeanour.

If the Houſe of Lords could deviate from the rules of evidence by a hair-breadth, they might leave them at an infinite diſtance. There can be no medium. For who ſhall fix and determine when they ſhall decide according to the law, and when by their will and pleaſure? Every thing would be debated and voted, and what was admitted in the evening might be rejected in the morning. If a father and a ſon, a peer and a commoner, were engaged in the ſame treaſon, murder, or other capital crime, they would be tried by different proofs, and perhaps meet with different fates. The Lords might even ſurpaſs

Dio-

Dionyſius in refinement in tyranny, and might condemn to death the wife or the ſon of a king upon the teſtimony of a dream. Indeed, one of our Queens, Anna Boleyn, was convicted of high treaſon in the court of the Lord High Steward, upon evidence not much better *.

Articles of impeachment were prepared againſt another of our Queens, Catherine Parr, but by her dexterity and addreſs, ſhe baffled the deſigns of her enemies. The law of England has no reſpect of perſons, and it ſurely will not deny to a Queen Conſort, and the Royal Blood, thoſe bleſſings of liberty and juſtice, which it ſecures to the meaneſt negro ſervant. If the peers ſhould diſregard the laws of evidence, they might condemn to death upon the teſtimony of copies of copies of forged and fab-

* One of the charges againſt this unhappy Queen, was, that ſhe had ſaid, "That the King never had had her heart," a declaration, if it was made, in which probably there was more truth than diſcretion: but this was adjudged to be high treaſon, in ſlandering her iſſue, according to an act of parliament, made a ſhort time before, for her honour and protection.

fabricated originals, the hearſay of hearſay, the *voces ambiguæ*, the tales of old women, or the prattle of children. They might reſort to what has been ſo eloquently deſcribed by a great maſter; *Sermonem ſine ullo certo autore diſperſum, cui malignitas initium dederit, incrementum credulitas, quod nulli non etiam innocentiſſimo poſſit accidere fraude inimicorum falſa vulgantium**. The ſanctuary of the faithful boſom of a wife might be violated, who might be dragged into court, and tortured to diſcloſe the confidential, and ſacred converſations with her huſband. What could prevent them from introducing even the rack itſelf, it forms a conſiderable branch of the Civil Law, and the laws of other nations; there is one ready in the tower, where for the glory of our law and country, it is exhibited among thoſe monſters, which are foreign and unnatural to our climate†.

They

* Quintilian Lib. 5. c. 3.

† Mr. J. Foſter takes notice that the rack has been mentioned in the Court of the High Steward, "For," ſays he,

They might even adopt that maxim of enthuſiaſm, *Credo quia impoſſibile eſt.* If there were

[a] At the trials of the Earls of Eſſex and Southampton, the Attorney General, Sir Edward Coke, extolleth the great clemency of her Majeſty towards the conſpirators, *that none of them were put to the rack or torture*; and acknowledgeth the goodneſs of God towards her, and his juſt judgment upon the priſoners, that the truth had been revealed by the witneſſes without rack or torture of any of them. A ſtrain of adulation, to ſay no worſe of it, nauſeous and ſordid, highly unbecoming a gentleman of the profeſſion, eſpecially one who well knew, and hath informed his readers, that any kind of torture, in that caſe, would have been utterly illegal." p. 244.

But ſuch is the delicacy or rather juſtice of our law, that it will not receive a confeſſion, which has been obtained either by the torture of hope or fear. The principle is the protection of innocence, and it ariſes from an apprehenſion, that under the influence of promiſes or threats, a man might be induced to declare himſelf guilty, when he is perfectly innocent. I know no inſtance by which this can be ſo aptly illuſtrated as a caſe put by one, who was well acquainted with the ſprings of human nature, and whoſe mind was not meanly imbued with the principles of the Engliſh law. I mean the author of Tom Jones. When poor Partridge was tried before Mr. Allworthy for infidelity to the marriage bed, and a confeſſion was produced againſt him by his wife, "Partridge ſtill perſiſted in aſſerting his innocence, though he admitted he had made the above mentioned confeſſion, which he however endeavoured to account for by proteſting

were no bounds and reſtraints, a rabble of evidence of every unprincipled denomination would ruſh into the Houſe of Lords, to ſupport ſuch eloquence as perhaps Rome and Athens never heard.

It is ſometimes aſked, if the Court of Chancery does not admit different rules of evidence from thoſe which are obſerved by the courts of law. Nothing is more erroneous than the general vulgar notion of a court of equity; it differs from the other courts, as they in a great degree differ from each other, in its forms and juriſdiction; but

teſting he was forced into it by the continued importunity ſhe uſed, who vowed, that as ſhe was ſure of his guilt, ſhe would never leave tormenting him till he had owned it, and faithfully promiſed, that in ſuch caſe, ſhe would never mention it to him any more. Hence, he ſaid, he had been induced falſely to confeſs himſelf guilty, though he was innocent, and that he believed he ſhould have confeſſed a murder from the ſame motive." Book 2. c. 6.

And the event of this trial affords a ſtriking inſtance, and it ſeems to have been the moral intended by it, where from not adhering to the legal rules of evidence, an innocent man is condemned to ſhame and ruin by a righteous judge.

but the Chancellors of the preſent time diſclaim all diſcretion, they cannot indulge their own notions of juſtice and equity, but are as much chained down by maxims, forms, and precedents as the other judges in Weſtminſter Hall. And with regard to evidence, we have the authority of Lord Hardwicke, "That the rules, as to evidence, are the "ſame in equity as at law, and if A. was "not admitted as a witneſs at the trial "there, becauſe materially concerned in "intereſt, the ſame objection will hold "againſt reading his depoſition here." And again, "The rules of evidence in this "court, as to witneſſes, are exactly the "ſame as at law *."

Even in the court of Star Chamber, the moſt arbitrary and deteſtable of all courts, the judges did not exerciſe any diſcretion with reſpect to evidence, but the teſtimony of witneſſes was admitted and rejected according to the general law of the land, as it

* 1 Atkyns's Rep. 453. and 2 Ibid. 48.

it prevailed in the courts of Weſtminſter Hall *.

Some proſecutions before the Roman Senate, perhaps, may be conſidered as analogous to impeachments before our high court of Parliament; but if we were to examine the accuſations preferred before that grave and auguſt aſſembly, I am inclined to think that we ſhould never find that the proſecutors requeſted the judges to diſpenſe with the legal proofs, or rules of evidence. At leaſt for this opinion I have the authority of one learned Civilian, Matthæus, who obſerves, that, *Verres quoque quam apertè Siciliam depopulatus fuerit, omnibus notum fuit, tamen et accuſator et probationes legitimo conſtituto judicio exierunt* †. And we have the authority of Cicero himſelf, who concludes his firſt Actio againſt Verres, by declaring, *Dicimus Caium Verrem, cum multa libidinoſè, multa crudeliter in cives Romanos atque in Socios,*

* Vide Hunter's Hiſtory of the Star Chamber, lately publiſhed in the Collectanea Juridica, No. vi. p. 205.

† Prolegom. cap. 4.

tios, multa in Deos hominesque nefariè fecerit, tum præterea quadringenties sestertium ex Siciliâ contra leges abstuliſſe. Hoc testibus, hoc tabulis, privatis publicisque auctoritatibus ita vobis planum faciemus, ut hoc statuatis, etiam si spatium ad dicendum nostro commodo, vacuosque dies habuissemus, tamen oratione longâ nihil opus fuisse. By alluding to the accuſation of Verres, it is far from my intention to inſinuate either a parallel or a contraſt between the governor of Sicily and the governor of India. It would ill become me to publiſh a ſingle reflection, either in favour, or to the prejudice, of any defendant, pending a public trial. I appear only as an advocate for the law of England. And I conceive, I and every Engliſhman have a right to ſay, that if either a ſubject or an alien, ſhould come to England with all the guilt of India accumulated upon his head, or concentrated in his heart, he is entitled to the benefit of our laws, and that we ought not to hunt him like a tyger.

I have now taken notice of every mate-

tial

rial authority which I have been able to diſcover, after ſome degree of diligence, which I felt myſelf challenged and ſtimulated to exert, by the attention which was paid to what I advanced upon a former occaſion. If there are any authorities upon this queſtion, which I have not enumerated, I muſt take ſhame to myſelf and confeſs my ignorance, a confeſſion which I ſhould think leſs diſhonourable than the imputation of wilful concealment from the public.

All that I have been able to collect I can contemplate with ſatisfaction, and with a confident hope, that I ſhall be acquitted of a reprehenſible degree of raſhneſs, for having declared what had been urged reſpecting the diſcretion of the Houſe of Lords, *a monſtrous doctrine*; and I truſt I may now be permitted to conclude, that it is totally repugnant to that liberty and juſtice, which are ſecured to us by almoſt every part of our government, but more peculiarly by the law of evidence,

which

which I feel myſelf unequal to deſcribe in ſuch clear and ſtrong language, as has been uſed by Lord Cowper, when he ſays, "The wiſdom and goodneſs of our laws "appear in nothing more remarkably, "than in the perſpicuity, certainty and "clearneſs of the evidence it requires to fix "a crime upon any man, whereby his life, "liberty, or his property, can be concern-"ed. Herein we glory and pride ourſelves, "and are juſtly the envy of all our neigh-"bour nations. Our law, in ſuch caſes, "requires evidence ſo clear and convinc-"ing, that every bye-ſtander, the inſtant "he hears it, muſt be fully ſatisfied of the "truth and certainty of it. It admits of "no ſurmiſes, innuendos, forced conſe-"quences, or harſh conſtructions, nor "any thing elſe to be offered as evidence, "but what is real and ſubſtantial accord-"ing to the rules of natural juſtice and "equity *."

* St. Tr. 10 vol. 52.

THE

THE APPENDIX,

CONTAINING SOME FURTHER OBSERVATIONS ON THE EFFECT OF A DISSOLUTION OF PARLIAMENT UPON AN UNFINISHED IMPEACHMENT.

THE important queſtion, whether an impeachment was determined by a diſſolution of Parliament, after having undergone a diſcuſſion for three days in the Houſe of Commons, was decided in the negative, the numbers being 143, and 30; and it muſt ever be conſidered as a moſt remarkable occurrence in the legal hiſtory of this country, that in the minority were the votes of his Honour the Maſter of the Rolls, the Attorney and Solicitor General, ſix King's Counſel, one Serjeant, and ſeveral other Barriſters of diſtin-

diſtinguiſhed eminence. When the ſame queſtion was agitated in the Houſe of Lords, it was again decided in the ſame manner, the numbers being there 66 and 18; and the Lord Chancellor, and the Lord Chief Juſtice of the King's Bench, voted in the minority. Previous to any public inveſtigation of this queſtion, the author of this Diſſertation was induced to collect and examine the authorities upon the ſubject, and to publiſh as his decided opinion, that an impeachment was terminated by a diſſolution of parliament †.

From the ſtrenuous ſupport, which this ſide of the queſtion received from the moſt learned part of the profeſſion of the law, and from an attentive conſideration of all that great abilities and induſtry have produced on the other, he muſt ever look back at that opinion with pride and ſatiſfaction. But for the concluſion which we pro-

† Vide an Examination of Precedents and Principles, by Ed. Chriſtian, 2d. Edition.

profeſſional men were obliged to draw from an unprejudiced examination of the ſubject, we have been treated with a degree of obloquy unparalleled in the Hiſtory of England. We have even been charged with waging war againſt the liberties and conſtitution of the country. We may have been miſtaken, but the principle, which directed us to that concluſion, is fixed, I truſt, upon too ſolid a foundation in our minds, ever to be ſhaken by the *civium ardor prava jubentium.*

A falſe and ruinous diſtinction has lately been propagated, and one is aſtoniſhed and grieved to hear it adopted by men of ſenſe and education, between the law and the conſtitution. Where ſhall we find them diſunited, by thoſe who have ably ſupported and richly adorned our government, Judge Blackſtone, Judge Foſter, Lord Holt, Lord Somers, Lord Bacon, Lord Coke, or by any author, whoſe

whose productions ought not to have been strangled in their birth?

There can be but two distinct ideas annexed to the word *constitutional*, it signifies either what is legal, or what is consonant to principles of liberty. If our conclusion was the law, it was constitutional in every sense of the word. For to assert that the Law of England can be altered by any power less than the united authority of the King, Lords, and Commons, is repugnant to every principle of our political liberty, and blasphemy against that constitution, which we have so much reason to idolize.

These are the true revolution principles. When our ancestors had gloriously cut off for ever, one corrupt branch from the succession to the crown, that they might not afford a precedent or example to posterity to have a partial revolution, upon every occasion, even for a turnpike bill, whilst there was a King upon the throne, they

were anxious not to appear to take away by their reſolutions or declarations alone, even the moſt terrible of all powers, that of diſpenſing with laws; and they ſeized the firſt opportunity to have the Bill of Rights confirmed by the authority of the King, Lords, and Commons. The two Houſes of parliament ſingly, or conjointly, have no more power to alter the eſtabliſhed Law of England, than the King has by his proclamations. Omnipotence has never yet been attributed to leſs than the whole. Theſe are ſo much firſt principles and ſuch obvious truths, that one is aſhamed to repeat them, but the late myſterious uſe of the word conſtitution has made it neceſſary.

That great patriotic Chief Juſtice Lord Holt, informs us, "That the authority of "parliament is from the law, and as it is "circumſcribed by law, ſo it may be ex-"ceeded, and if they do exceed thoſe legal "bounds and authority, their acts are "wrongful, and cannot be juſtified any

"more

"more than the acts of private men." Salkeld's Reports, 505.

There is one inſtance upon record, where the Houſe of Lords, upon a writ of error decided, from the hardſhip and unreaſonableneſs of the caſe, contrary to the opinions of the judges and all legal authothority; but it was immediately perceived, that if the Lords ſhould thus indulge their propenſity to do juſtice, they would become the ſole legiſlators of the country. The judgment could not be reverſed. But as a reproof, the Commons inſtantly brought in a bill, which paſſed into a ſtatute, to eſtabliſh proviſions agreeable to the judgment of the Lords. So we now refer to the ſtatute and not to the judgment *.

Thoſe

* It was the caſe of Reeve, v. Long. Salk. 228.

An eſtate was given by will to the father for life, and after his death, to his firſt ſon in tail, but no truſtees were appointed to ſupport contingent remainders; the father died without any iſſue born, but left his widow with child, who was delivered of a ſon. All the legal authorities were clear, that this poſthumous ſon could

not

"Thoſe who would overthrow the law of England by their principles of the conſtitution, without an act of parliament, may read an awful leſſon on the tendency of their doctrines in the reſolution of the Houſe of Commons, on the 4th of Jan. 1648.

"Reſolved, that whatever is enacted or "declared for law by the Commons in par- "liament aſſembled, hath the force of law, "and all the people of this nation are con- "cluded thereby, although the conſent or "concurrence of the King, or Houſe of "Peers, be not had thereto."

This was a natural prologue to the tragical drama that was performed on the 30th of the ſame month.

Such induſtry, learning and abilities have

not take the eſtate, but the Lords, from the hardſhip and cruelty of the caſe, determined that he ſhould have it. And now by 10 and 11 W. 3. c. 16. it is enacted, that poſthumous children in all ſuch limitations ſhall take in the ſame manner, as if they had been born before the death of their parent.

have lately been exerted in ſearch of arguments and authorities, that I think myſelf extremely fortunate that in what I had collected, and from ſome books without the ordinary aſſiſtance of an index, I have ſo little to correct.

In the 15th of Ed. 3. the Archbiſhop of Canterbury was arraigned in parliament agreeably to his own deſire, and in a parliament held two years afterwards, the King of his own accord ordered all the papers touching the arraignment to be cancelled. From what appeared to me, I ſtated that it was probable that the arraignment and the cancelling of the papers happened in the ſame parliament, but the ſuperior accuracy of the Hon^ble. Spencer Perceval, has ſhewn § that the papers were cancelled in a new parliament, which correction I am ready to acknowledge. But as this is the only caſe, which affords a ſemblance of a continuation of a criminal pro-

§ Vide A Review of the Arguments in favor of the continuance of Impeachments notwithſtanding a diſſolution. By a Barriſter.—avowed by Mr. Perceval.

proſecution from the creation of parliaments, till the year 1678, I ſhall make this obſervation upon it, that the King's command to cancel the papers reſpecting the arraignment, can be no more conſidered as a continuation of a trial, than the expunging of the reſolution of the Houſe of Commons upon the Middleſex Election from their journals, is a continuation of that tranſaction.

But we are perpetually told, that there are caſes both ways. No caſe ſince the beginning of time has yet been diſcovered, in which part of the evidence was given in one parliament, and part in another. It is true, that on the 19th of March, 1678, the Houſe of Lords reſolved, that a diſſolution did not alter the ſtate of impeachments brought up in a former parliament; but on the 22d of May, 1685, the former order was *reverſed* and *annulled*. Notwithſtanding this, the caſes which happened within thoſe ſeven years, are ſaid to be a ſet-off againſt thoſe caſes, which have been determined ſince. It has always appeared

to

to me, that you might as well argue, that our government may be republican, because there is a case both ways; or that, since the proceedings of the Middlesex Election were expunged from the journals of the House of Commons, a member expelled for a libel is incapable of being re-elected, because there are cases both ways. The disaffirmance of power and authority, which has once been exercised, affords a much stronger argument against the existence or legality of it, than if it had never been so exercised and so disclaimed. If we were to stop here, the appearance and the speedy disappearance of these cases, like comets, instead of oppugning, would have strongly corroborated the general principles of our system. But Mr. Perceval has found a paragraph in Rapin's History, which he thinks destroys the authority of the order of 1685, and therefore restores to credit the order of 1678. The paragraph is this, "The Commons having given the King so real a demonstration of their zeal and affection (by voting

" him a revenue) the Lords were willing
" likewiſe to ſhew him how much they
" were devoted to him in any thing that
" lay within their power; to that end, the
" King having ſent a warrant to the At-
" torney General to enter a *noli proſequi*
" upon the indictment againſt the Popiſh
" Lords, who had been priſoners in the
" Tower for the plot, and againſt the Earl
" of Danby, the Houſe of Peers annulled
" their order of the 19th of March 1678-9,
" and entirely diſcharged theſe Lords who
" had been let out only upon bail *".

If Mr. Perceval had read a little further in the ſame volume, he would have found, that Rapin never meant to ſay that the Lords intended to oblige the King, *in any thing that lay within their power*, inconſiſtent with the law and the conſtitution; for he declares in the ſtrongeſt language, *that it is without foundation they are charged with a deſign of ſacrificing to the King the intereſt of their religion and their country.*

* Rap. 15 vol. p. 25.

country. The whole paſſage is ſtriking; "When one compares," ſays he, "the "firmneſs of the members of this parlia-"ment, when they believed the intereſts "of religion were at ſtake, with their ex-"treme zeal for the King in the beginning "of their ſeſſion, it muſt be inferred, that "their condeſcendance was owing purely "to their miſtaken good opinion of him, "and that their firmneſs now was owing "to their recovery from that miſtake. It "is therefore without foundation, that "they are charged with a deſign of ſacri-"ficing to the King the intereſt of their "religion and their country. The contrary "manifeſtly appeared in the reſiſtance "made by them to the temptation, which "the King laid before them, and this even "in his preſence and face to face. This, "in my opinion, is the higheſt degree to "which reſolution can be carried *.

How then did this queſtion ſtand at the re-

* 15 vol. p. 99.

revolution? No inſtance in the hiſtory of this country can be found, in which a criminal proſecution was continued beyond the parliament in which it was commenced, prior to the order of 1678, and this was reſcinded and annulled in 1685. In the Journals of the Houſe of Commons, it is recorded, that on the 3d of May, 1782, "The Houſe was moved, that the entry "in the journal of the Houſe of the 15th "day of February, 1769, of the reſolution, 'That John Wilkes Eſq; having been in 'this ſeſſion of parliament expelled this 'Houſe, was and is incapable of being elec-'ted a member to ſerve in this preſent 'parliament' "might be read, and the "ſame being read accordingly; a motion "was made, and the ſame being put; that "the ſaid reſolution be expunged from the "journals of the Houſe, as being ſubver-"ſive of the rights of the whole body of "electors of this kingdom, It was re-"reſolved in the affirmative. Ordered, that "all the declarations, orders and reſolu-

"tions

"tions of this Houſe, reſpecting the elec-
"tion of John Wilkes Eſq; be expunged,
"and the ſame were expunged accordingly."

Are we not compelled to conclude from this, that the queſtion of incapacity is leſs open to diſcuſſion, and the law upon it more firmly eſtabliſhed, than if the two reſolutions had never had exiſtence? Where then is the difference between theſe reſolutions, and the two orders of the Houſe of Lords, except that the orders of the Lords follow each other after 7 years, and the reſolutions of the Commons after 13; ſuch then is the ſtate of the caſe at the revolution. When we proceed further, we ſhall find within two years after the revolution, when the principles of the conſtitution were ſuppoſed to be better underſtood, that two peers and five commoners were diſcharged from impeachment upon this ground ſolely, viz. becauſe a diſſolution of parliament took place before they were proſecuted with effect.

At the time of my former publication,

I had overlooked the caſe of Sir Adam Blair and his four aſſociates, but I repreſented the precedent of the diſmiſſion of Lord Saliſbury and Lord Peterborough as deciſive of the queſtion.

But thoſe gentlemen, who have adopted the other ſide of the debate, have attempted to diminiſh the force of this authority, by endeavouring to prove that it is within the limits of poſſibility, that the two peers might be diſmiſſed upon another ground, viz. becauſe they were entitled to the benefit of a ſtatute pardon. But the caſe of Sir Adam Blair and four others, who had attempted to overturn the revolution, by publiſhing a declaration of James the Second, entirely precludes the ſuppoſition of ſuch a poſſibility in the caſe of Lord Saliſbury and Lord Peterborough; and I think incontrovertibly proves that all the ſeven were diſmiſſed, becauſe the diſſolution determined their impeachments. For the Lords were ſo little diſpoſed to diſmiſs the impeachment of Blair and his accomplices, that on the 2d

of

of July, 1690, they resolve, contrary to former authorities, to proceed in their impeachment, though they were commoners and charged with high treason *. But on the 5th of April preceding, in consequence of their petition, the Lords had resolved to take into consideration, whether impeachments continue from parliament to parliament, the impeachment having been exhibited by the Commons in a preceding parliament; but no report is made before the prorogation over the summer. On the meeting of parliament again in October, the two peers, who had likewise been impeached in a former parliament, present a petition; upon this the Lords make a similar resolution as before, to take into consideration the effect of a dissolution; and after an elaborate investigation of the question, they dismiss Lord Salisbury and Lord Peterborough, and in a short time afterwards they discharge Sir Adam Blair and the four other commoners. As far as it affected their case, the question was pure and

* The case of Fitzharris and other authorities prove that no commoner can be impeached for treason or felony.

and unmixed, their crime was atrocious, and it is clear from the resolution of the Lords to try them, though they were commoners, for high treason, there was no disposition to shew them favour. The most zealous advocate will scarce have perseverance and fortitude to deny, that these five were discharged merely because a dissolution had put an end to their impeachment.

It is not my intention to pursue all the authorities, or to attempt a refutation of the arguments on the other side; the object of this appendix is only to supply some deficiencies in my former publication. In that pamphlet I endeavoured to establish that it was an original inherent quality in the constitution of parliaments that nothing could be continued after a dissolution, and that this was a fundamental property in the creation of all courts. this conclusion I drew from general principles, and the consideration of the origin of judicature. This was a line of argument in which I ventured to advance, unconscious of any assistance

ſiſtance or ſupport. It affords as great a gratification to a profeſſional man, to find his concluſions from general principles, confirmed by high authority, as it does to a philoſopher, to ſee his theory eſtabliſhed by experiment. In the caſe of Captain Streaton, who had been committed by the parliament in the time of the commonwealth, and, after the parliament was diſſolved, was brought by *habeas corpus* before the court of upper bench, the court were of opinion that he ought to be diſcharged, becauſe this order of commitment was neither an act, nor a judgment, and therefore could not continue after a diſſolution; and Lord Chief Juſtice Roll obſerved, "That a parliament is a new court, they "appear, and are always ſummoned by "new writs"*. Here the Chief Juſtice evidently declares, that the new writs are the commiſſion, by which the new court is conſtituted.

Lord Chancellor Nottingham in his Treatiſe on the King's power of granting par-

* Harg. St. Tr. 2 vol. 210.

pardons in cases of impeachment, lately published, declares, "It is a mistake to say, "that impeachments depend from parlia- "ment to parliament, and whatever some "late precedents † to the contrary may "import, there will be cause hereafter to "resume the consideration of these prece- "dents. But though the breaking up of "the court, wherein the prosecution is be- "gun, should not break off the prosecu- "tion, yet it does not follow, but that the "pardon of the crime, which is prosecuted, "may well enough extinguish it." Here the reason assigned by Lord Nottingham, why impeachments cannot depend from parliament to parliament is, because the court is broken up, and therefore as in other courts the prosecution is broken off. All authorities concur, that the Scotch parliament, though all the estates sat in the same House, was established upon the same feudal principles as the English. In the fifth parliament of James the third, in the year 1467, there is a statute which puts

† The precedents between 1678 and 1685.

puts it beyond all cavil and controverſy, that the court of parliament is analogous to other courts, with regard to its continuation and diſſolution. The title and the act are as follow, "The parliament, juſtice "aires, nor chalmerlane aires, needis not "to be continued fra daie to daie." Item, "It is ſeene ſpeedefull, that the court of "parliament, juſtice aire, nor chalmerlane "aire, nor *ſik like courtes*, that hes con- "tinuation, needis not to be continued fra "daie to daie, bot that they be of ſik "ſtrength, force and effect, as they had "been continued fra daie to daie, unto the "time that they be *diſſolved*. The parlia- "ment be the King: the juſtice aire be the "juſtice: the chalmerlane aire be the chal- "merlane, and *otheris ſik like courtes*. And "that nane exception proponed be ony "perſones be admitted in the contrary *."

Theſe authorities to prove that there is an analogy between parliament and other courts, perhaps deſerve a little more conſidera-

* Murray's Scotch Statutes,

ſideration, than the unſupported aſſertions, which have lately been ſo confidently advanced to the contrary.

In my former publication, I have taken notice of that peculiar property of an impeachment, viz, that the Lords cannot pronounce judgment, till it is demanded by the Commons. Though the Lords ſhould be unanimous in their verdict of guilty, yet ſtill the guilt or innocence of the perſon impeached may be debated in the Houſe of Commons, and they might be unanimouſly of opinion, that judgment ought not to be demanded.

In Lord Macclesfield's impeachment, the Lords without a diſſenting voice, pronounced him guilty, yet 65 of the Commons after much debate, voted againſt the demand of judgment.

In Lord Strafford's trial, the Commons ſent the following meſſage to the Lords, "That this Houſe hold it neceſſary and "fit,

"fit, that all the Members of the Houſe "may be preſent at the trial; to the end "every one may ſatisfy his own conſcience, "in the giving of their vote to demand "judgment†."

This being the great conſtitutional characteriſtic of an impeachment, how can the People of England demand judgment by their repreſentatives, when few of theſe repreſentatives have heard the whole of the trial?

If it is ſaid they may ſatisfy their conſciences by reading the evidence, which in the preſent trial is ordered to be printed for that purpoſe; in a caſe of blood this would be a propoſition, which a conſcientious man would ſhudder at. There are ſome minds ſo obdurate, that they can only be awakened by caſes of horror and extremity. Who is the ſcribe, that has become the keeper of the conſciences of both Houſes of Parliament? where is the oath

† Commons' Journals 11th of March, 1640.

oath provided by the conſtitution for the faithful diſcharge of his duty? what ſecurity has he given to the country, that he will not make affirmative and negative ſentences depend upon his will and pleaſure, or his taſte in compoſition? The daſhes and ſcratches of the moſt expert ſhorthand writer produce miſerable confuſion, and they are again to receive the finiſhing touch from a blundering printer.

Is there a man in England, who would lay his hand upon his heart, and condemn a fellow ſubject to death, upon ſuch evidence? if there be, I envy him not the poſſeſſion of that heart. Even if the words were reported with perfect accuracy, where is the ready recollection, the confident tone, the change of colour, the quivering lip, the heſitating voice, which ſtamp an impreſſion, that no language can convey?

This is the greateſt inconvenience in continuing an impeachment after a diſſolution, viz. that judgment cannot

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conſcientiouſly be demanded by a full repreſentation of the Commons of England.

We have never denied that it may be dangerous to leave the King the prerogative of ſcreening the greateſt ſtate delinquents from the vengeance due to their crimes. Such a power may be highly dangerous, but this is an argument for its *conſtitutional* abolition, no proof of its non-exiſtence. The King certainly poſſeſſed, and perhaps does ſtill poſſeſs, this power in a much more formidable ſhape.

It is a much eaſier method of protecting a favourite, to put the great ſeal to a piece of parchment, which compleatly cancels at once a black catalogue of crimes, than to throw a whole nation into combuſtion, whoſe repreſentatives would return with inflamed indignation.

The object of their fury could only expect ſafety in flight, a puniſhment, in

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a commoner, probably more severe than a judgment would inflict.

That the King possessed and exercised in all times the power of granting pardons to persons impeached, Lord Nottingham in his treatise has abundantly proved. I shall here introduce a remarkable record, in which it is both acknowledged by the Commons, and asserted by the King.

Item prie la commune a nostre dit seigneur le Roi que nule pardon soit grante a nully persone, petit ne grande, q'ont este de son counseil et serementez, et sont empeschez en cest present parlement de vie ne de membre, fyn ne de raunceon, de forfaiture des terres, tenemenz, biens, ou chatalx, lesqueux sont ou serront trovez en aucun defaut engontre leur ligeance, et la tenure de leur dit serement; mais q'ils soient duement punix selonc leur desert: ne q'ils ne serront jammes conseillers ne officers du Roi, mais en tout oustez de la courte le Roi et de conseil as touz jours. Et sur ceo soit en present parlement fait estatut s'il plest au Roi, et de toux

autres en temps a venir en cas ſemblable, pur profit du Roi et de Roialme.

Reſponſio.— Le Roi ent fra ſa volente come mieltz lui ſemblera. Rot. Parl. 50. Ed. 3. n. 188.

Twelve years after the revolution, it was thought expedient to take away, by an *Act of Parliament* *, part of this perogative, viz. the power of pardoning before conviction. But ſince that time, as before, the King has retained and exerciſed the power of granting a pardon after judgment was pronounced; for Mr. J. Blackſtone tells us, that "after "the impeachment and attainder of the ſix "rebel lords in 1715, three of them were "from time to time reprieved by the "Crown, and at length received the benefit "of the King's moſt gracious pardon †".

I ſhall now take my final leave of this ſubject by obſerving, that how Cicero could have argued this important queſtion, he has

* 12 & 13 W. 3. c. 2. † Com. 4 vol. 400.

ſias left us an immortal ſpecimen, in every ſyllable of which he ſeems to have been inſpired by the Genius of the Engliſh Conſtitution.

Neque me illa oratio commoveret, quod ait Attius indignum eſſe facinus, ſi ſenator judicio quenquam circumvenerit, legibus eum teneri: ſi eques Romanus hoc idem fecerit, non teneri. Ut tibi concedam, hoc indignum eſſe, tu mihi concedas neceſſe eſt, multo eſſe indignius in eâ civitate, quæ legibus contineatur, diſcedi à legibus. Hoc enim vinculum hujus dignitatis quâ fruimur in republica, hoc fundamentum Libertatis, hic fons æquitatis; mens et animus et conſilium, et ſententia civitatis poſita eſt in legibus. Ut corpora noſtra ſine mente, ſic civitas ſine lege, ſuis partibus, ut nervis ac ſanguine et membris, uti non poteſt. Legum miniſtri, magiſtratus; Legum interpretes, Judices; Legum denique idcircò omnes ſervi ſumus, ut liberi eſſe poſſimus. Oratio pro Cluentio.